IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-263

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTI CHI; FRED P. McNEESE, ROBERT McALISTER, ROBERT HITT, individually as news reporters and as members, officers, and directors of the Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi; SOUTH CAROLINA BROADCASTERS ASSOCIATION; DR. RICHARD URAY, individually and as Executive Manager of the South Carolina Broadcasters Association; SOUTH CAROLINA PRESS ASSOCIATION; THE ENTERPRISE, INC.; EDWARD M. SWEATT, individually as President of the South Carolina Press Association and as a shareholder and member of the Board of Directors of The Enterprise, Inc.; and CAROLYN KAY HARRIS,

Petitioners,

v.

THE HONORABLE J. ROBERT MARTIN, JR., United States District Court for the District of South Carolina; MARK W. BUYCK, JR., Esq., United States Attorney for the District of South Carolina; J. ELLIOTT WILLIAMS, United States Marshall for the District of South Carolina; and MILLER C. FOSTER, JR., United States Clerk for the District of South Carolina,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINION SOUGHT TO BE REVIEWED

This petition for certiorari seeks review of the decision of the United States Court of Appeals for the Fourth Circuit in *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al.,* F.2d (No. 77-1636, 4th Cir. May 17, 1977), which substantially sustained an order restricting media reporting of a criminal trial based on the opinion of the United States District Court. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Marin, Jr., et al.,* 431 F. Supp. 1182 (D.S.C. 1977).

JURISDICTION

The opinion presented for review was decided on May 17, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for this Court's review are the following:

1. Whether the restrictive order entered on May 31, 1976, in *United States v. J. Ralph Gasque, et al.,* Crim. No. 76-104, is valid under the First Amendment to the United States Constitution;

2. Whether the restrictive order entered on May 31, 1976, in *United States v. J. Ralph Gasque, et al., supra,* is valid under the Fifth Amendment to the United States Constitution; and

3. Whether, in the exercise of its supervisory powers over the lower federal courts, this Court should require that district courts entering restrictive orders of this kind must precede such orders by notice and the opportunity for a hearing to interested parties and must accompany them with a written opinion articulating the basis on which they are entered.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Constitutional Provisions

The petition for certiorari presents issues arising under the First and Fifth Amendments to the United States Constitution. The relevant portion of those Amendments are the following:

First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Statutory Provisions

Also relied upon as a predicate to one element of the claim under the First Amendment is section 1866(a) of the Jury Selection and Service Act, 28 U.S.C. § 1861, which provides, in pertinent part, that the names of persons that may be required for assignment to grand or petit juries be "publicly draw[n] at random from the qualified jury wheel . . ."

REASONS FOR GRANTING THE WRIT

I. STATEMENT OF THE CASE

A. Introduction

In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), this Court articulated the constitutional standards applicable to classic prior restraints on the reporting of matters relating to criminal trials. Although the Court refrained from ruling that such prior restraints can never be sustained, the rigorous standards set forth in its opinion invariably point to that conclusion. *See id.*, at 570, 570-71 (White, J., concurring); *id.*, at 572, 572-73 (Brennan, J., concurring in judgment).

Thus, following *Nebraska Press Association,* judicial attempts to impose classic prior restraints on the reporting of matters related to criminal trials will largely disappear. Throughout the nation, however, trial courts increasingly are resorting to methods that indirectly achieve what could directly be accomplished only by satisfying the rigorous and perhaps insuperable standards of *Nebraska Press Association;* orders increasingly are being entered that exact the same censorial impact by denying newsmen access to critical information.

The Courts of Appeals and state courts are in hopeless disarray in attempting to articulate and apply the constitutional standards by which restrictive orders of this kind must be assessed. For example, although the Fourth and Tenth Circuits now require only that a "reasonable likelihood" of threat to a fair trial be found to justify the entry of orders of this kind, *see Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al., supra; United States*

v. Tijerina, 412 F.2d 661 (10th Cir. 1969), *cert. denied*, 396 U.S. 990 (1969), the Sixth and Seventh Circuits have concluded that such restrictive orders can only be sustained upon a finding that they were entered in response to a "serious and imminent threat" of interference with a fair trial. *CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1974), *cert. denied sub nom., Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). This case affords the Court the opportunity to articulate and apply the proper constitutional standards, and thus to provide much-needed guidance on the important and increasingly litigated questions of constitutional law that remain unresolved after *Nebraska Press Association v. Stuart, supra*, 427 U.S. at 564, n.8. This petition also poses an equally important question regarding the kinds of procedural safeguards that should precede and accompany the entry of orders of this kind, another issue on which the Courts of Appeals are divided. Compare *Central South Carolina Chapter, Society of Professional Journalists, et al., supra*, with *Schiavo v. United States*, 504 F.2d 1 (3d Cir. 1974), *cert. denied sub nom. Ditter v. Philadelphia Newspapers, Inc.*, 419 U.S. 1096 (1975).

B. Fundamental Impact of the Challenged Order

The overall effect of the challenged order is to impose sweeping, and in some cases, absolute, prohibitions on the rights of speech and association. Individually, the challenged order prohibits media resort to a number of important reportorial techniques that are essential to the full and accurate reporting of criminal trials. Collectively, the challenged order effectively imposes a blackout on all sources of information other than those obtained in the actual trial proceedings themselves.

Section One of the order prohibits "[e]xtrajudicial statements by participants in the trial . . . which *might* divulge prejudicial matter not of public record in the case . . . ." (emphasis added). By virtue of this broad restriction, all readily available sources of information – a broad category of persons, including witnesses and attorneys – were prohibited from discussing even such matters as the financial and legal implications of the indictment and its ramifications for the operation of the federal and state manpower programs.

Section Two of the order requires that all participants in the trial "avoid mingling with or being in the proximity of reporters, photographers, and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courthouse during recesses in the trial." By virtue of this restriction, reporters were barred from seeking explanatory sources of information during trial recesses, generally the only available times for approaching trial participants during the day. For reporters who work for daily newspapers or television and radio stations with daily and even hourly deadlines, this prohibition effectively denies them information they must collect at the time.

Section Three precludes the release of the names and addresses of prospective jurors "except on Order of Court." This section of the order thus precludes the press from exercising its traditional function of monitoring political, racial and other important characteristics of the prospective jury pool – characteristics that may be particularly important in a case with such substantial political overtones.

Finally, Section Four of the order provides that "[a]ll witnesses are prohibited from news interviews during the trial period." The necessity for this absolute proscription is far

from apparent in view of the censorial impact of Sections One and Two. Nevertheless, this section prevents the press from asking a witness anything, even the correct spelling of his name, the witness' occupation, or his address. It also prohibits the press from obtaining information from the witnesses – many of whom are public officials – which may have no relationship at all to the trial.

Individually, each restriction imposes a severe restraint on First Amendment freedoms and substantially restricts the reporting of this important trial. Some even have an impact that transcends this trial, inhibiting discussion of other issues by persons legitimately concerned with falling prey to the order's broad and ambiguous terms. Thus, even though some portions of the order may not explicitly impose restrictions on the publication of information, the cumulative impact of the web of restrictions is to create an almost total blackout on critical sources of information.

C. Procedural History of Case

This petition seeks review of the second ruling of the United States Court of Appeals for the Fourth Circuit in *Central South Carolina, et al. v. The Honorable Robert J. Martin, Jr., et al., supra* (attached as Appendix B hereto), which sustained an order restricting reporting of a criminal trial on the basis of the previous opinion of the United States District Court for the District of South Carolina (attached as Appendix C hereto).

On May 31, 1976, without providing notice or an opportunity for a hearing to trial participants or interested members of the media, the United States District Court for the District of South Carolina entered an order, *sua sponte*, restricting comment and reporting of the then-pending criminal trial in *United States v. J. Ralph Gasque, et al.* (the challenged order is attached as Appendix A hereto).[1] The order was entered "for reasons appearing to the Court." Those reasons were nowhere articulated, however.

Petitioners promptly sought and obtained a stay from the United States Court of Appeals for the Fourth Circuit, which indicated that their challenge to the restrictive order should be pursued by writ of mandamus. Accordingly, a writ of mandamus was filed in that Court. On

[1] The trial, then scheduled for June 21, 1976, was subsequently rescheduled for May 23, 1977. Following the Court of Appeals' decision and this Court's denial of petitioner's motion for stay, the trial began, and resulted in the conviction of defendant Gasque and the other defendants.

As the Court recognized in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47 (1976), this does not render the case moot. Like other cases of this kind, the issues here presented are "capable of repetition, yet evading review." *Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). As in *Nebraska Press Association*, a possibility remains that this conviction may be set aside on appeal or by collateral attack, thus possibly renewing the same issues in this very case. Moreover, it should be noted that the order challenged herein is virtually identical to a restrictive order entered by the same Court in *United States v. Addy*, Crim. No. 68/313 (D.S.C. May 8, 1969). Defendant Gasque also presently stands indicted for other, similar offenses. Petitioners therefore believe that this District Court or other judges of the United States District Court will enter similar orders in Senator Gasque's subsequent trial and in other more publicized criminal trials, as will other trial courts throughout the nation.

January 13, 1977, however, the Court of Appeals abandoned its earlier petition and ruled that mandamus was an inappropriate remedy for a challenge of this nature. *Central South Carolina Chapter, et al. v. United States District Court for the District of South Carolina,* 551 F. 2d 559 (4th Cir. 1977). The Court rejected petitioners' request that the case be considered as an appeal and refused to reach the merits of the case, suggesting instead that the claims should be pursued by original complaint in the District Court. The stay was dissolved at that time. This decision is not presented for this Court's review.

In accordance with the ruling of the Court of Appeals, on March 30, 1977, petitioners filed a complaint in the District Court, seeking a declaratory judgment and preliminary and permanent injunctions. The motion for preliminary injunction was never ruled upon. On May 3, 1977, however, the District Court dismissed the complaint, holding that petitioners lacked standing and, alternatively, that the challenged order was constitutional. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al., supra.* The District Court subsequently denied petitioners' motion for stay pending appeal.

Petitioners noted their appeal and sought a stay in the Court of Appeals. Petitioners also sought expedition of the appeal. On May 17, 1977, the Court substantially affirmed on the basis of the opinion of the District Court. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin Jr., et al.,* ____F.2d____, No. 77-1636 (4th Cir. May 17, 1977).

Initially, the Fourth Circuit curtly observed that "any inference in our previous opinion to the contrary notwithstanding," *but see* 551 F.2d at 561, it now believed that mandamus was the proper remedy. Treating petitioners' complaint and supporting submissions as a petition for mandamus, the Court reversed the District Court's determination that petitioners lacked standing. Curiously, however, the Court refrained from expressing an opinion regarding the propriety of the prohibitions on extrajudicial statements by the defendants, since the record did not reveal that those persons had objected to the restrictive order.

The Court of Appeals affirmed the District Court's order in all but minor respects "on the opinion of the district court." It did, however, limit the prohibition on "mingling" by confining the applicability of that prohibition to the courthouse itself. Likewise, the Court of Appeals limited the reach of the prohibition against photography and the sketching of jurors to the inside of the courthouse.[2]

Although substantially affirming the District Court's opinion, the Court of Appeals noted the "time honored" and customary nature of courtroom sketching and suggested that the District Court might reconsider its prohibition against juror sketching at trial.[3] Similarly, the Court of Appeals noted that certain parts of the District

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[2]The District Court had constructed its order so as to make those prohibitions applicable in the courtroom, the courthouse and the adjacent grounds.

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[3]At the request of other members of the media, the District Court subsequently agreed to permit the sketching of jurors at trial.

Court's order may prove unnecessary once a jury was empaneled. The Court therefore suggested that the District Court might reconsider portions of its order in the event the jury was sequestered.[4]

Thus, the Court of Appeals' ruling adopted the District Court's conclusion that restrictive orders of this kind can be imposed prior to trial and thereafter sustained throughout the trial if there is a "reasonable likelihood that prejudicial news prior to trial will jeopardize the defendants' right to a fair trial." *Central South Carolina Chapter, et al., supra,* 431 F. Supp. at 1188.[5] Petitioners' motion for stay pending the filing and disposition of this petition was thereafter denied.[6]

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[4]Petitioners had urged both the District Court and the Court of Appeals that the restrictive order was not necessary, since juror sequestration offered a preferable manner for protecting the defendants' Sixth Amendment rights. That argument was rejected by the District Court, however.

Following the Court of Appeals' decision and the District Court's selection and sequestration of a jury, counsel for petitioners wrote the District Court to request that, in view of the protection afforded by the juror sequestration, the restrictive order be vacated. (Counsel's letter is included as Appendix D, hereto.) That request elicited no formal response, and the Court indicated that the restrictive order would remain in force during the trial.

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[5]The District Court nevertheless concluded that it perceived a "substantial likelihood" of such a possibility when it entered the order. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al.,* 431 F. Supp. 1182, 1188, n.5 (D.S.C. 1977).

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[6]Justices Brennan and Marshall voted to grant the stay.

II. THE "REASONABLE LIKELIHOOD OF THREAT TO A FAIR TRIAL" STANDARD APPLIED TO JUSTIFY SWEEPING OR ABSOLUTE PROHIBITIONS ON SPEECH AND ASSOCIATION REFLECTS AN INADEQUATE RECOGNITION OF THE FIRST AMENDMENT INTERESTS AT STAKE AND THE ALTERNATIVE MEASURES FOR INSURING A FAIR TRIAL, AND SHOULD BE REJECTED.

A. The Total Impact of the Challenged Order Is Substantially the Same as a Prior Restraint.

Preliminarily, it should be recognized that the cumulative impact of the challenged order – the focus of the prior restraint analysis identified by the Court in *Nebraska Press Association v. Stuart, see* 427 U.S. at 559 – is to impose sweeping and pervasive restrictions on the media's ability to report matters related to this criminal trial fully and fairly. As a practical matter, the order restricts reporting of the criminal trial to a report only of those matters that transpire in open court. The order prohibits media resort to any number of common reportorial techniques designed to assure the accuracy of the reporting of matters that transpire in open court, and to provide the additional information that often is necessary for a thorough understanding of the significance of those events.

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[7]The challenged ban on courtroom sketching of jurors applied directly to the media and constituted a classic prior restraint. Jurors sitting in a public trial are part of the "public property" of the occurrences of open court. *Craig v. Harney,* 331 U.S. 367 (1947). Thus the media is free to report those matters, *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975), and one of the commonly recognized techniques of that reporting is by providing sketches that portray the jury's role in the trial. Possible juror distraction, cited

(continued)

As Judge Craven previously recognized in his concurring and dissenting opinion in the initial mandamus proceeding in this case, the prohibition against news interviews can only fairly be said to apply directly to the media. *Central South Carolina Chapter, et al. v. United States District Court for the District of South Carolina, supra,* 551 F.2d at 566, n.2. The same applies to the "mingling" prohibition. Moreover, viewed in its totality, the order challenged herein "freezes" information just as surely as would an order prohibiting publication of information already obtained; the impact is equally "immediate and irreversible." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559.

Relying substantially on the dictum in this Court's opinion in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the Courts in this case condluded that such sweeping restrictions – including absolute *per se* prohibitions on "mingling" with the press and witness interviews during the trial period – could be sustained if there was a generalized finding of a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." *Central South Carolina*

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[7](continued)

by the District Court in justification for its sketch ban, can be dealt with by assuring that any sketch artist perform that function in an unobtrusive manner. In addition, the District Court's subjective impressions of the threats posed by juror sketching are not sufficient to support this prior restraint on First Amendment rights, especially when viewed in light of the Court's own concession that it has found similar bans unnecessary in other cases. Similarly, the Court's denial of access to the jury list failed to recognize that under 28 U.S.C. § 1866 (a) the list of prospective jurors must consist of names "publicly draw[n]," and thus is information in the public domain. *Cf. Cox Broadcasting Co. v. Cohn, supra.*

Chapter, et al. v. The Honorable J. Robert Martin, Jr., et al., supra, 431 F. Supp. 1188.[8] Thus, the Fourth Circuit cast its vote with that of the Tenth Circuit in requiring a scant finding of a reasonable likelihood of a threat to a fair trial in order to justify sweeping, and in some cases absolute, prohibitions on the full reporting of criminal trials.

B. The Lower Courts Are in Plain Conflict as to the Constitutional Standards To Be Applied in These Cases.

The Courts of Appeals are in hopeless disarray in articulating the basic constitutional standard by which restrictive orders of this kind are to be judged. For example, in *United States v. Tijerina,* 412 F.2d 661, 666 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969), the Tenth Circuit concluded that a reasonable likelihood of prejudicial news which could make the empanelment of an impartial jury more difficult and thus tend to prevent a fair trial suffices to support the entry of such orders. The Sixth and Seventh Circuits, on the other hand, apply a more demanding standard. The Seventh Circuit held in *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242 (7th Cir. 1974), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers,* 427 U.S. 912 (1976), that blanket prohibitions of this kind cannot stand. Instead, the Seventh Circuit concluded, bans on comment can only be imposed when "the particular statement posed a serious

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[8]Since the Court of Appeals' decision was explicitly based on the opinion of the District Court, *Central South Carolina Chapter, et al., supra,* ____ F.2d ____, petitioners rely on the District Court's opinion in identifying the basic rationale and the standards that now govern in the Fourth Circuit.

and imminent threat of interference with a fair trial." *Id.* at 251. Similarly, the Sixth Circuit concluded in *CBS, Inc. v. Young,* 522 F.2d 234, 241 (6th Cir. 1975), that "serious and imminent threats to the fairness and integrity of the trial" must be found in order to justify restraints similar to those sustained in this case.

C. The "Reasonable Likelihood" Standard Affords Insufficient Recognition to the Strong First Amendment Protections Against Restraints on the Press.

Any consideration of this issue must proceed from the recognition of the media's role as the "handmaiden of et

Court, including its most recent opinion in *Nebraska Press Association v. Stuart,* 427 U.S. 539, (1976), have emphasized the critical importance of open and public trials, and the role of the press in assuring and enhancing that right. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975); *Times-Picayune Publishing Corp. v. Schulingkamp,* 419 U.S. 1305, 1307-08 (1974) (Chambers Opinion of Powell, J.); *Sheppard v. Maxwell, supra,* 384 U.S. at 349-50; *Estes v. Texas,* 381 U.S. 532, 541 (1965); *Craig v. Harney,* 331 U.S. 367, 374 (1947). In this case, the importance of full and accurate reporting of this trial was heightened by the allegations of abuse of the public trust directed both against defendant Gasque and, by the defendant, against the prosecution as well.[9] These issues assume a vastly

[9]Defendant Gasque, who for many years was a State Senator, was indicted on charges of misuse of federal manpower funds, and other, related offenses. He was not re-elected following the indictment. Gasque contended that the indictment was "politically motivated."

greater public significance, for they go to the very heart of our political and judicial systems.

Public officials occupy a unique position in our society. Their position in the public trust elicits substantially greater public interest in being fully informed as to their affairs, even those that may not strictly relate to the public office they occupy. *See, e.g., Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 344-45 (1974). Thus, the Supreme Court has repeatedly emphasized that the First Amendment responsibilities of the press are especially important when reporting about elected public officials, such as Senator Gasque; public programs, such as the local and federal manpower programs in South Carolina, which were implicated by the charges against Gasque; and the public prosecutor's exercise of his power and duties. As the Fifth Circuit noted in a similar context in *United States v. Dickinson,* 465 F. 2d 496 (5th Cir. 1972):

> "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. Therefore, 'particularly in matters of local political corruption and investigation it is important that freedom of communications be kept open.'" *Id.* at 501, quoting *Wood v. Georgia,* 370 U.S. 375, (1962).

See also, Comment, *Prejudicial Publicity in Trials of Public Officials,* 85 Yale LJ. 123 (1975).

Petitioners by no means suggest that persons who enter public service sacrifice their constitutional right to a fair trial. It is clear, however, that in trials involving public officials, the public's right to be informed, and the media's corresponding right to information essential to the full and accurate reporting of those matters, is substantially greater. In such cases, the normal importance of the press as the "handmaiden of effective judicial administration," *Sheppard v. Maxwell, supra,* 384 U.S. at 350, is complemented by the critical importance of the press in bringing to the public the full panoply of facts relevant to the public's assessment of its public officials.

Cases of this kind present issues that go to the very core of First Amendment values. The burden on those seeking to restrain or inhibit full reporting of these proceedings and their attendant facts therefore must be substantially greater. The necessity of clearly demonstrating, by reference to concrete evidence of record, that the criminal defendants' right to a fair trial cannot be assured by alternative measures that do not inhibit the free flow of this critical information is at its zenith.

Neither *Sheppard* nor the relatively few cases dealing with questions of access to newsworthy events, *see, e.g., Branzburg v. Hayes,* 408 U.S. 665 (1972); *Pell v. Procunier,* 417 U.S. 817 (1974); *Saxbe v. Washington Post,* 417 U.S. 843 (1974), support the Fourth Circuit's conclusion in this case. For example, the Court's interpretation of *Sheppard* is by no means supported by that decision and is inconsistent with the emphasis placed in *Nebraska Press Association* on the many preferable alternatives short of restrictions on the full and accurate reporting of criminal trials.

An examination of *Sheppard* reveals that the "reasonable likelihood" standard set forth in that opinion related to transfer and continuance – alternatives that fall short of the sweeping abridgement of First Amendment rights imposed in this case. *See Sheppard v. Maxwell, supra,* 384 U.S. at 362. Although the Court noted in passing that trial participants should not be allowed to frustrate the judicial function, *id.*, its specific articulation of the standard governing restrictions on comment by those persons stated, "the trial court might well have proscribed extrajudicial statements *which divulged prejudicial matters.*" *Id.* at 361 (emphasis added). Similarly, the "Free Press-Fair Trial" standards of the Committee on the Operation of the Jury System cannot be relied upon to expand the *Sheppard* standard beyond its own boundaries. The ultimate standard is set by the Constitution.

The *Sheppard* statement that proscriptions against trial participants' comment be aimed at those statements that divulge prejudicial matters therefore supports petitioners' contention that these sweeping abridgments of their First Amendment rights of the nature here considered be assessed by the rigorous standards traditionally applied to prior restraints. The traditional "compelling interest" required in justification of abridgements of First Amendment rights cannot be satisfied by a "reasonable likelihood" of threat to a fair trial. That standard is too lax and amorphous. It points more toward speculation than toward the kinds of concrete harm that should be required to justify these infringements on First Amendment rights. Thus, the Court should endorse the decisions of the Sixth and Seventh Circuits in *CBS, Inc. v. Young, supra,* and *Chicago Council of Lawyers, supra,* and require that such orders can be entered only in response to a serious and imminent threat to a fair trial.

Additionally, regardless of the precise articulation of the standard identifying the threat to Sixth Amendment rights that must be required, all such orders must be carefully scrutinized to determine whether alternative measures falling short of such serious infringements of the First Amendment would suffice to address possible prejudice to a fair trial.[10] Absent such an inquiry, restrictions on First Amendment freedoms may be imposed unnecessarily. Finally, of course, any restrictive order that might be justified under the above criteria can be no broader than is necessary to deal with the evil to which it is addressed.

III. THE RECORD IN THIS CASE WILL NOT SUPPORT THE ENTRY OF THE CHALLENGED ORDER EVEN UNDER THE LAX "REASONABLE LIKELIHOOD" STANDARD ADOPTED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

Even assuming the "reasonable likelihood" standard to be constitutionally acceptable, the record in this case will not support the entry of the challenged order. An examination of the stories published prior to the District Court's order does indicate that this case received considerable media attention. The record is barren of support for the District Court's contention that media coverage evinced a substantial or even reasonable likelihood of

[10]This requirement reflects the Court's repeated insistence that the government must employ alternatives that do not infringe on First Amendment rights whenever possible. *See, e.g., Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

jeopardizing defendants' right to a fair trial, however.[11] Moreover, the prohibitions against "mingling" with the media and witness interviews are *absolute* prohibitions, not even qualified by the "reasonable likelihood" standard the District Court purported to apply.

The issues at stake in *United States v. J. Ralph Gasque, et al.* are not the kind that arouse great public passion or prejudice. Compare *Nebraska Press Association v. Stuart, supra; Times-Picayune Publishing Corp. v. Schulingkamp, supra; Sheppard v. Maxwell, supra.* The public awareness of and interest in this matter notwithstanding, the record contained no suggestion that the trial would be converted into a circus or carnival affair. Compare *Estes v. Texas,* 381 U.S. 532 (1965); *Sheppard v. Maxwell, supra.* Also absent from this case are media publications of confessions or other highly emotional statements that reach the ultimate issues to be resolved at trial. Compare *Nebraska Press Association v. Stuart, supra; Rideau v. Louisiana,* 373 U.S. 723 (1963). In sum, there was no suggestion in this case that full media coverage had or would create a "trial atmosphere that [would be] utterly corrupted by press coverage." *Murphy v. Florida,* 421 U.S. 794, 798 (1974). The Court's resctrive order was thus a severe overreaction to virtually a non-issue of prejudicial pretrial publicity.

A careful examination of the District Court's opinion indicates that its determination that the perceived "sub-

[11]Petitioners included as an appendix to their Complaint in the District Court a compilation of all of the published stories relating to the trial that had appeared prior to the issuance of the challenged order. Thus, the record affords the Court the opportunity to assess for itself the basis on which the District Court and the Court of Appeals concluded that the threat to a fair trial was sufficient to support the entry of the challenged order.

stantial likelihood" of a threat to a fair trial that purportedly justified the challenged order reflected its concern that the body of published information, particularly that denominated by the Court as "prejudicial," was widely disseminated and had the effect of "making more difficult the selection of an impartial jury."[12]

Restrictions on the full and accurate reporting of a public criminal trial of this importance surely cannot be justified on the simple conclusion that publicity would make the empanelment of an impartial jury "more difficult." By that standard, virtually any pretrial publicity in any case would support the entry of restrictions of the nature challenged in this case. Neither *Sheppard v. Maxwell, supra,* nor any other decisions of this Court, nor the recommendations of the Kaufman Committee for dealing with the "Free Press-Fair Trial" issue endorse or

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[12]To the extent that the Court's assessment of this issue rested on its assumption that the exposure of potential jurors to possibly prejudicial information that might not subsequently be admissible at trial necessarily would render a fair trial impossible, *see Central South Carolina Chapter, et al. v. The Honorable J. Robert Martin, Jr., et al., supra,* 431 F. Supp. 1188 n. 4, it was in error. That is not the test. Rather, the governing standard is whether, in light of the prospective juror's knowledge and attitudes, that person can render a fair and impartial verdict based on the evidence adduced at trial. Experience demonstrates that such measures as careful *voir dire* can assure the defendant's right to a fair trial even in cases where pretrial publicity has been extensive. "Taken together, the cases demonstrate that pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 554. *See also Dobbert v. Florida,* 45 U.S. L.W. 4721, 4726-27 (U.S. June 17, 1977); *Murphy v. Florida,* 421 U.S. 794 (1974); *Stroble v. California,* 343 U.S. 181 (1952).

allow the entry of sweeping, and in some cases absolute, restrictions on First Amendment freedoms on so scant a perception of threat to a fair trial.

Finally, even assuming the record might justify some of the restrictions imposed in this case for the purpose of facilitating the empaneiment of an impartial jury, that justification cannot be asserted in support of the continuation of the challenged order after the jury has been selected. The District Court's concern that jurors would be exposed to prejudicial information not made a part of the record at trial clearly can be dealt with by measures short of such sweeping abridgements on First Amendment freedoms. The jury can, for example, be instructed to avoid contact with news stories relating to the trial. If the threat is more severe, the jury can and should be sequestered during the period of trial.

An examination of the District Court's opinion indicates that that Court did not even consider these alternatives, however. Thus, even taking the District Court's belated rationalizations at face value, it is clear that the record and the opinion below fail to provide any justification for continuing the challenged restrictions on comment, news interviews, or "mingling" after the jury has been empaneled.[13]

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[13]The Court did indicate that sequestration of prospective jurors prior to the empanelment of a jury would be impractical. *Central South Carolina, et al. v. The Honorable J. Robert Martin Jr., et al., supra,* 431 F. Supp. at 1189, n.6. At no point, however, did the Court suggest that it considered this or other restrictions on juror conduct after the jury was selected as a means of striking the appropriate balance between the First and Sixth Amendments.

(continued)

By any label, it must be recognized that the limitations imposed on newsgathering and the full and accurate reporting of this matter are substantial. Such restrictions must be based on justifiable grounds, and must be no broader than necessary to avert the evils that necessitate the abridgement of First Amendment right. The First Amendment still requires that such restraints on First Amendment freedoms be justified by a "compelling interest." *See, e.g., NAACP v. Button,* 371 U.S. 415, 419 (1963); *Sheppard* does not alter or diminish this basic requirement. No such "compelling interest," no matter how articulated in terms of reasonable or substantial likelihood of threat to a fair trial, can be supported on the record of this case in view of the many alternatives for dealing with the threat of prejudice by means other than abridgments of First Amendment rights.

IV. THE CHALLENGED ORDER SUFFERS FROM FATAL DEFECTS OF VAGUENESS AND OVERBREADTH.

Even assuming that a constitutionally adequate basis for the entry of some restrictions could be demonstrated, any such restrictions would still be subject to other standards traditionally applied in First Amendment cases.

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[13](continued)

This was noted by petitioners in the District Court and the Court of Appeals, prompting the Court of Appeals lamely to note that the District Court might reconsider the necessity for the challenged order. Subsequently, even though a jury had been chosen and sequestered, the District Court refused petitioners' request that the order be dissolved, and it remained in effect throughout the trial.

For example, the order must be narrowly tailored to the perceived evils that justify its imposition; it is not. The order likewise must be free of vagueness; it is not. Instead, the challenged order is both vague and overbroad.

The order is overbroad in that it prohibits conduct that could not reasonably be deemed to represent a threat to the defendants' right to a fair trial or to the integrity of the Court. *See, e.g., Chicago Council of Lawyers v. Bauer, supra; CBS Inc. v. Young, supra; United States v. CBS, Inc.,* 497 F.2d 102 (5th Cir. 1974); *Dorfman v. Meiszner,* 430 F.2d 558 (7th Cir. 1970). For example, the "mingling" prohibition is unnecessary in light of the restrictions on comment. Indeed, the impact of the challenged order is broader even than the issues at stake in this trial. As one affidavit of record indicates, this order has inhibited discussion of other public issues that are unrelated to this trial.

Similarly, terms such as "mingling" and the "environs of the court" are nowhere defined in the order and defy easy understanding or interpretation. The vagueness challenge must be resolved solely be reference to the order on its face. Subsequent "judicial gloss" or offers to confer to clarify vague portions of the order cannot now be set forth to salvage it from its inherent vagueness. Other inherently vague terms, such as "being in the proximity of reporters, photographers and others," are nowhere defined, not even at this late date.

V. ORDERS OF THIS KIND CAN BE ENTERED ONLY IN ACCORDANCE WITH PROCEDURAL SAFEGUARDS MANDATED BY THE DUE PROCESS CLAUSE OR THE COURT'S SUPERVISORY POWERS.

The challenged order was entered without notice and an opportunity for prior hearing to petitioners and other interested parties. Petitioners' First Amendment rights are plainly a "liberty" interest within the Fifth Amendment, see *Board of Regents v. Roth*, 408 U.S. 564 (1972), and thus cannot be abrogated without prior notice and an opportunity for a hearing. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). And, even if this Court were reluctant to constitutionalize this requirement through the Due Process Clause, a hearing should nevertheless be required as a matter of fundamental fairness and in the exercise of the Court's supervisory powers, as the Court of Appeals for the Third Circuit recognized in *Schiavo v. United States*, 504 F.2d 1 (3d Cir. 1974) (*en banc*), *cert. denied sub nom. Ditter v. Philadelphia Newspapers, Inc.*, 419 U.S. 1096 (1975).

Restrictive orders of this kind frequently generate litigation in which "time is of the essence" in the appellate court's resolution of the issues. *See, e.g., Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329 (Chambers opinion of Blackmun, J.). Invariably, reviewing courts are asked to rule on the adequacy of the justifications that prompted the entry of the challenged order, as well as on whether the challenged order is no broader than necessary to respond to the perceived threats that prompted its entry. Invariably, the resolution of these issues requires that reviewing courts make difficult and sensitive

judgments regarding the appropriate balance between the defendants' Sixth Amendment right to a fair trial and the First Amendment protections for the public's right to be adequately informed about the workings of the criminal justice system.

Certainly the history of this case evinces the need that orders of this kind be preceded by a hearing at which interested parties be afforded the opportunity to comment on the need for such restrictions as well as on the terms of any restrictions that might, of necessity, be entered. Here the order was entered *sua sponte*, without any notice to interested parties. The order was entered "for reasons appearing to the Court," which were nowhere specified in the opinion and were not articulated by the entering court until months later, in response to petitioners' action filed in the District Court. This is hardly a procedure that is conducive to the prompt and responsible resolution of the difficult constitutional issues produced by cases of this nature. Thus, if the Court should determine that the Due Process Clause does not constitutionally compel the procedures urged herein, it should endorse the conclusion of the Third Circuit and require that United States District Courts afford such procedural safeguards through the exercise of its supervisory powers over the lower federal courts.

CONCLUSION

For the reasons articulated herein, petitioners respectfully suggest that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

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APPENDIX A

ENTIRE TEXT OF ORDER ENTERED IN *UNITED STATES v. J. RALPH GASQUE, ET AL.*, ON MAY 31, 1976

"For reasons appearing to the Court, it is Ordered that the above case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further Ordered that

"(1) Extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.

"(2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during recesses in the trial.

"(3) The names and addresses of prospective jurors are not to be released except on Order of Court, and no photograph shall be taken and no sketch made of any juror within the environs of the Court.

"(4) All witnesses are prohibited from news interviews during the trial period.

"(5) The United States Marshal at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,

(a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.

(b) Allocation of seats to the news media representatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

* * *

The United States Court of Appeals modified paragraph two by rendering it inapplicable to "the sidewalks adjacent thereto" and limited pragraph three by defining "environs of the Court" to mean only the inside of the courthouse, not the adjacent grounds. *See Central South Carolina Chapter, et al. v. The Honorable J. Robert Martin, Jr., et al.*, ____F.2d____, No. 77-1636 (4th Cir. May 17, 1977).

APPENDIX B
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-1636

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; FRED P. McNEESE, ROBERT McALISTER, ROBERT HITT, individually as news reporters and as members, officers, and directors of the Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi; SOUTH CAROLINA BROADCASTERS ASSOCIATION; DR. RICHARD URAY, individually and as Executive Manager of the South Carolina Broadcasters Association; SOUTH CAROLINA PRESS ASSOCIATION; THE ENTERPRISE, INC.; EDWARD M. SWEATT, individually as President of the South Carolina Press Association and as a shareholder and member of the Board of Directors of The Enterprise, Inc.; and CAROLYN KAY HARRIS

Appellants

v.

THE HONORABLE J. ROBERT MARTIN, JR., United States District Court for the District of South Carolina; MARK W. BUYCK, JR., Esq., United States Attorney for the District of South Carolina; J. ELLIOTT WILLIAMS, United States Marshall for the District of South Carolina; and MILLER C. FOSTER, JR., United States Clerk for the District of South Carolina

Appellees

Appeal from the United States District Court for the District of South Carolina, at Florence. J. Robert Martin, Jr., District Judge.

Submitted May 16, 1977 Decided May 17, 1977

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Mitchell Rogovin, George T. Frampton, Jr., Joel I. Klein, David R. Boyd, James C. Harrison, Jr., Costa M. Pleicones, Jack C. Landau, for Appellants; Thomas E. Lydon, Jr., United States Attorney, Wistar D. Stuckey, Assistant United States Attorney, Glen E. Craig, Assistant United States Attorney, Lu Jachnycky, Attorney, Department of Justice, for Appellees.

WIDENER, Circuit Judge:

This matter came before the district court on a complaint seeking declaratory and injunctive relief against the district court's order of May 31, 1976, and on a motion for a stay of that order pending appeal. The challenged order, reproduced below,[1] establishes certain restrictions upon extrajudicial statements and actions of participants in the pending criminal trial of J. Ralph Gasque in the United States District Court for the District of South Carolina.

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[1] The order reads in pertinent part as follows:

"For reasons appearing to the Court, it is Ordered that the above case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further Ordered that

(continued)

United States District Court for the District of South Carolina.

The complaint was dismissed by the district court by order dated May 2, 1977, and is now before us on appeal. The district court also denied plaintiffs' motion for a stay

---

[1](continued)

"(1) Extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.

"(2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during recesses in the trial.

"(3) The names and addresses of prospective jurors are not to be released except on Order of Court, and no photograph shall be taken and no sketch made of any juror within the environs of the Court.

"(4) All witnesses are prohibited from news interviews during the trial period.

"(5) The United States Marshall at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,

(a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.
(b) Allocation of seats to the news media representatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

The Society did not contest the validity of section five of the order.

The first appeal in this matter is reported as F2 (4th Cir. 1977).

pending appeal by order of May 10, 1977. That motion is renewed here pursuant to Rule 8 of the Federal Rules of Appellate Procedure.

We believe that mandamus is the proper remedy to request the relief prayed for here, any inference in our previous opinion to the contrary notwithstanding. See Note: *Ungagging the Press,* 65 Georgetown Law Review 81, for a collection of some decisions on the subject.

The plaintiffs having substantially complied with the requirements of Rule 21(a), Fed. R. App. P., we think the complaint and supporting submissions should be treated as a petition for mandamus, and we so treat them. As this implies, we think plaintiffs have standing to seek issuance of the writ. Notwithstanding that petitioners desire for access to sources of information may be a broadly based concern, shared by the public at large, if petitioners can show an injury "to [themselves] that is likely to be redressed by a favorable decision," *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976), if they have alleged a sufficient "personal stake in the outcome of the controversy," *Baker v. Carr,* 369 U.S. 186, 204 (1962), the constitutional requirement of standing is satisfied. We think these tests are met here. We do not regard as wholly speculative the relationship between the district court's order and the plaintiffs' difficulties in seeking to perform their reportorial functions. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

Considering the papers before us as a petition for mandamus, and having carefully considered the submissions of the parties, we accordingly hold:

The district court's order of May 2, 1977 dismissing the complaint is in all respects affirmed, on the opinion of the district court, F.Supp. (D.S.C. 1977), as that opinion addresses the merits of the controversy, subject to the following qualifications:

1. To the extent that the district court's order may be construed to prohibit extrajudicial statements concerning the trial on the part of the defendant, Gasque,[2] we express no opinion as to its propriety, since the defendant has not objected to the order in any respect. Any rights of Gasque not waived are reserved.

2. In paragraph 2 of the May 31st order, we regard the prohibition on mingling upon the sidewalks adjacent to the courthouse as overly broad. The district court will lift its prohibition on mingling as it applies to adjacent sidewalks.

3. With respect to the prohibition in paragraph 3 of the said order upon the sketching of jurors within the environs of the court, we recognize that courtroom sketching is a time-honored custom in many communities and many courts. The district judge has indicated that any particular aspect of the order is open to reconsideration during the trial, and, viewing the prohibition in that light, we assume that it will be reconsidered upon request if fears of juror distraction prove unfounded.

4. Also in paragraph 3, we construe the "environs" of the United States District Court in Columbia, South Carolina as meaning inside the courthouse.

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[2] Gasque, as we use the word, refers to any or all defendants.

5. Once a jury is empaneled at the inception of the trial, the district court may find that parts of the May 31st order are no longer necessary to ensure a fair trial or juror impartiality. If, for example, the jury were sequestered, access of the press to trial participants may no longer pose the same threat to the conduct of a fair trial. We leave this matter to the district court in the first instance, believing that our intervention at this point would be premature.

Since the petition for mandamus is in all but minor respects denied on the merits, it follows that petitioners' motion for a stay pending appeal to this court is likewise denied.

The mandate will issue forthwith because the criminal trial is due to commence May 23, 1977.[3]

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[3] The parties have requested that we dispose of this appeal as soon as possible and filed briefs. The government has waived oral argument, but the plaintiffs have indicated a desire for it. In order to dispose of the case at once, we have decided the case on the briefs and the record.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI: ROBERT HITT, individually as news reporters and as members, officers and directors of the Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi; SOUTH CAROLINA BROADCASTERS ASSOCIATION: DR. RICHARD URAY, individually and as Executive Manager of the South Carolina Broadcasters Association; SOUTH CAROLINA PRESS ASSOCIATION: THE ENTERPRISE, INC.: EDWARD M. SWEATT, individually as President of the South Carolina Press Association and as a shareholder and member of the Board of Directors of The Enterprise, Inc.; and CAROLYN KAY HARRIS,

Plaintiffs,

Civil Action No. 77-575

v.

THE HONORABLE J. ROBERT MARTIN, JR., United States District Court for the District of South Carolina; J. ELLIOTT WILLIAMS, United States Marshal for the District of South Carolina; and MILLER C. FOSTER, JR., United States Clerk for the District of South Carolina.

Defendants.

[Filed May 2, 1977]

ORDER

This matter is before the Court upon the above captioned parties[1] cross-motions for summary judgment upon the pleadings pursuant to a complaint for injunctive and declaratory relief seeking to void an order issued by this Court on May 31, 1976 in the criminal case of *United States v. J. Ralph Gasque, et al.*, No. 76-104. The plaintiffs, with the exception of one who is a newspaper subscriber, are newsmen, journalists and news media establishments. The order issued May 31st reads as follows:

> "For reasons appearing to the Court it is Ordered that the above captioned case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further ordered that
>
> (1) Extra judicial statements by trial participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.
>
> (2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during the recesses in the trial.

[1] Although the plaintiffs have named this Court as a party defendant in the captioning of this action, this Court will address the claims raised in the complaint in light of the possible collateral consequences a determination may have on the pending criminal case before this Court which is the subject of the May 31st order now under attack and in light of the unique posture of these cases.

> (3) The names and addresses of prospective jurors are not to be released except on Order of the Court, and no photographs shall be taken and no sketch made of any juror within the environs of the Court.
>
> (4) All witnesses are prohibited from news interviews during the trial period.
>
> (5) The United States Marshal at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,
>
> (a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.
>
> (b) Allocation of seats to the news media represenatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

The plaintiffs do not contest the validity of section five of the May 31st order in this action. They do, however, contest the remaining portions of the order and contend that it constitutes a prior restraint on freedom of the press in violation of their First Amendment rights accorded by the United States Constitution. As the basis of their contentions, the plaintiffs assert that the order has effectively destroyed the right of the press to print the news by destroying its right to gather news from important sources, a right they contend is necessarily a First Amendment corollary to the right to report public proceedings and the conduct of public officials. Additionally, the plaintiffs contend that the order was issued in violation of their constitutional due process right to be served notice and to be heard prior to its issuance and that the order suffers from vagueness and overbreadth.

The claims asserted by the plaintiffs are new to this Court only in the sense that this is the first and only proceeding before this Court to which it may properly address the same. Prior to the instant action, the identical plaintiffs had instituted an appeal or in the alternative a petition for a writ of mandamus attacking the provisions of the May 31st order in the United States Court of Appeals for the Fourth Circuit. As it was apparent to that Court that the complainants were not parties to the criminal proceedings against J. Ralph Gasque and his codefendants and that their right to relief from the order was far from clear and indisputable, it dismissed the appeal and denied, in the alternative, the petition for mandamus. A stay order which had been previously issued against the criminal case by the Court of Appeals was dissolved as well. *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi, et.al. v. United States District Court for the District of South Carolina, et.al.,* F.2d (4 Cir. 1-13-77).

The plaintiffs now seek independent recourse against the provisions of the May 31st order, apart from the proceedings of the criminal case, by way of a motion to stay or preliminary injunction of the order and by way of permanent injunctive and declaratory relief against the same. That complaint was served on the interested parties named as defendants and an answer and memorandum has since been submitted by the United States District Attorney for the District of South Carolina. The answer, entitled motion to dismiss pursuant to Rule 12(b), F.R.Civ.P. or in the alternative, motion for summary judgment pursuant to Rule 56, F.R.Civ.P. was filed on behalf of the named defendants, Williams, Foster and on behalf of Thomas Lydon, who recently succeeded Mark Buyck as the District Attorney for the District of South Carolina. In reply, the plaintiffs have

filed a pleading and memorandum entitled opposition to motion to dismiss and cross-motion for summary judgment. The plaintiff also requested in that pleading that this Court enter a final order as promptly as possible in recognition of the urgency of the issues raised in the complaint.

It is immediately recognized and agreed to by the parties that there are no disputed facts and that the issues raised and joined by the pleadings, affidavits and exhibits attached thereto and the previous proceedings before the Court of Appeals are purely legal questions and that the motion for a stay or preliminary injunction may be determined by this Court in absence of an evidentiary hearing without prejudice to any of the interests involved.[2] It is also apparent that the action for permanent injunctive and declaratory relief should be advanced and expedited in order that a final determination in this matter be made with some urgency. The issues raised thereto are also without factual dispute or controversy and are purely legal questions so as to support the consolidation of this action for a final determination in the absence of a hearing without prejudice to any of the interests involved and as agreeable by the parties. Accordingly, the remainder of this order will be devoted to the merits of the claims raised that the May 31st order con-

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[2] The plaintiffs had earlier submitted a letter to this Court requesting an evidentiary hearing upon the motion for a stay or preliminary injunction. The government's answer to the complaint followed shortly thereafter and contended that there was no necessity for a hearing as the matters raised and joined by the pleadings were purely legal questions. Therefore, this Court found it appropriate to issue an order on April 19, 1977 requiring an expedited reply from the plaintiffs including pleadings, if any, which would support a showing of the necessity for a hearing. As indicated the plaintiffs have agreed the matters raised may be resolved without a hearing.

stitutes a prior restraint against the press in violation of the First Amendment and that the order was issued in violation of the plaintiffs' Fifth Amendment due process rights to notice and a hearing and that the order suffers from vagueness and overbreadth.

There first appears to be a serious question of standing for the plaintiffs to assert this action. The concept of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The relevant inquiry, assuming justiciability of the claim, is whether the plaintiff has shown injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation of the Constitution. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 US 26 (1976). The concept of standing has also been said to focus upon the inquiry whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by statute or constitutional guarantee in question" *Data Processing Service v. Camp,* 397 US 150 (1970); *C.B.S. v. Young,* 522 F.2d 234 (7 Cir.1975).

Turning to the latter concept of standing first, it is immediately recognized that this is not a case of direct restraint upon the right of the public or the press to publish or speak what it knows, but is rather a restraint upon trial participants in a criminal case (none of which are plaintiffs in this

civil action) to prohibit the trial participants from divulging extrajudicial prejudicial matters not of public record in the pending criminal case. The plaintiffs contend that such a restraint destroys its right to publish news by destroying its right to gather news. They argue that the right to gather news is a necessary First Amendment corollary to the right to publish and report public proceedings or in other words, that the interest in gathering news is within the zone of interests to be protected by the constitutional right to publish and speak.

While *C.B.S. v. Young* (supra) would appear to stand for the proposition that the news media have standing to assert a claim that restraints on trial participants in a civil case deny access to potential sources of information and therefore deny members of the press their constitutional right to gather news, this Court would find the case of questionable authority. *C.B.S.* relies on dicta from *Branzburg v. Hayes,* 408 US 665 (1972) that newsgathering is not without some First Amendment protection, thus the conclusion that the news media has standing to assert the claim that any news gathering restraints raise constitutional First Amendment issues. However, *Branzburg* also indicated that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally, citing *Zemel v. Rusk,* 381 US 1 (1965) or stated differently that the right to speak and publish guaranteed by the First Amendment does not carry with it the unrestrained right to gather information. *Branzburg* also cited with approval *Sheppard v. Maxwell,* 384 US 333 (1966) wherein it was stated that "a trial court might well have proscribed extrajudicial statements by any lawyer, party, witness or court official which divulged prejudicial information."

Most courts have addressed the question of the news media's right of access to particular information in terms of equal protection, finding that if the public has a right to certain information then the press, which has no greater or lesser right is also entitled to the information. *Pell v. Procunier,* 411 US 817 (1974); *Saxbe v. Washington Post Co.,* 417 US 843 (1974), see also Judge Winter's dissent, *US v. Steelhammer,* F.2d , (4 Cir.8-22-76). This Court believes in light of *Branzburg, Zemel, Sheppard, Pell* and *Saxbe* that any right to particular information apart from equal protection considerations is factually limited to information which could be categorized as "public information" such as public records, *McCoy v. Providence Journal,* 190 F.2d 260 (1st Cir. 1961) cert.den. 324 US 894, records filed with the Clerk of Court. *In Re Washington Post, et.al.* (US v. Mandel), F.2d (4 Cir.8-19-76) and the transpirations of a public trials, *Craig v. Harney,* 331 US 367 (1947).

As Mr. Justice Stewart stated in an address on the subject of the news media's right to know in 1974:

> "So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can. But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. *There is no constitutional right to have access to particular government information or to require openness from the bureacracy* . . . . The Constitution in other words establishes the contest, not its resolution. (emphasis added) *United States v. Mitchell,* 386 F.Supp. 639 (D.C.D.C. 1975).

Because the information particularly sought in connection with this civil action does not fall into the class and category of public information this Court does not find that the press has any First Amendment right to gather it.

Turning to the former concept of standing, this Court's order of May 31st does not prohibit the public or press from doing anything but only limits the participants in the criminal case from conducting themselves in certain manners and therefore neither the public nor the press has suffered any personal injury other than the generalized complaint that they have been denied their "right" to know.[3] When the asserted harm or injury, if any, is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone, if any, normally does not warrant exercise of jurisdiction. *Warth v. Seldin,* 422 US 490 (1975). The plaintiffs here make no allegation that the purported injury sustained by them is no greater nor lesser than the public's at large since the injury which they contend is proscribed by the Constitution is no more than the lack of knowledge of certain purportedly newsworthy information. Further, the plaintiffs make no allegation or showing that even if no order existed that the alleged injury would be diminished. Although the plaintiffs aver that the trial participants will not talk to them as a result of the May 31st order, it is merely speculation that the trial participants would voluntarily disclose such information to the plaintiffs in absence of the order. *Simon* (supra)

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[3] As was noted in Branzburg at ftn 22, citing Zemel, there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.

Accordingly, this Court finds that the plaintiffs have no standing to assert the particular claims raised herein since they have no right to the particular information sought and since their purported injury is shared by the public in general and is speculatively remedial.

If it were arguable that the plaintiffs do in face have standing to assert their claims then it is apparent to this Court that they are not entitled to the relief they seek. This Court has always recognized that "Courts are a branch of government and a criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens." *United States v. Mitchell* (supra). It must also be recognized that our system of government in guaranteeing rights to its various citizens also guarantees any citizen accused of a crime the right to a fair and impartial trial, a guarantee which the government has a duty to assure all its citizens. As recognized in *Estes v. Texas*, 381 U.S. 532 (1965), a fair trial, "the most fundamental of all freedoms" must be maintained at all costs. While there is no question that "what transpires in the courtroom is public property," *Craig v. Harney*, 331 US 367 (1947) the Court also has the duty and authority to assure to the extent possible that prejudicial evidence will not be presented to prospective jurors prior to the trial of a criminal case in order to assure that the defendant is tried before the public by a fair and impartial jury.[4] While it is conceded that any order of the

[4] The United States Supreme Court has interpreted the requirement of an impartial jury to mean that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel Attorney General* 205 US 454 (1907).

Court which is issued to assure a criminal defendant of a fair trial that directly prohibits or restrains publication of information already gained or commentary on judicial proceedings held in public is a prior restraint in violation of the First Amendment and must be justified by a clear and present danger that the defendants' right to a fair trial is in jeopardy; the clear and present danger test does not apply when the Court issues an order such as the May 31st order which does not constitute a prior restraint on the press' or public's right to speak or publish but only restrains the trial participants from certain conduct thereby proscribing the flow of prejudicial information to be gained by non trial participants. Recently, the United States Supreme Court in *Nebraska Press Assoc. v. Stuart*, 427 US 539 (1976) has stated that the trial judge must take strong measures to insure that an accused is accorded a fair and impartial trial, citing *Sheppard* and that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial", the trial judge should continue the case, transfer it, sequester the jury, or see that neither "the accused, witness, court staff, nor enforcement officers coming under jurisdiction of the Court should be permitted to frustrate its functions."

Although the *Nebraska* case may be read that to permit a prior restraint of information already in the hands of the press or public, is to require a clear and present danger to a fair trial, *Nebraska* has approved the standard set out in *Sheppard* that extrajudicial statements of trial participants which divulge prejudicial information may be proscribed if there is a reasonable likelihood that prejudicial news prior to trial will jeopardize the defendants right to a fair trial.[5]

[5] This Court found that there was a substantial likelihood of such when it issued the May 31st order.

The Report of the Kaufman Committee on the operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968) as adopted by the Judicial Conference of the United States is of like effect. See also *United States v. Tijerina*, 412 F.2d 666 (10 Cir. 1969) cert..den. 396 US 990; *Farr v. Pitchess*, 522 F.2d 464 (9 Cir. 1975) cert.den. 427 US 912 (1976). The conclusion to be drawn from reading *Nebraska* is that proscriptions on trial participants' prejudicial statements in a criminal trial are not to be considered as prior restraints on non-trial participants' First Amendment rights to publish and comment upon judicial proceeding and that proscriptions on trial participants' prejudicial statements are to be judged by the *Sheppard* standard as it regulates the conduct of the participants in the trial.

Prior to entering the May 31st order, from the Court's reading of various newspapers within the State of South Carolina and watching and listening to reports on the broadcast media, this Court took notice of the widely publicized and sensational nature of the criminal case against J. Ralph Gasque, a state senator, and his co-defendants. The publicity was and remains extensive as can readily be evidenced by the collected newspaper clippings presented by the plaintiffs in this action and those presented in the previous proceedings before the Court of Appeals and this collection represents only a portion of the total continuing publicity. The Court has also taken notice of the numerous and extraordinary inquiries made by representatives of the press and news media to this Court concerning this particular criminal case. The Court has also taken notice, that the information contained in the media reports contrary to the assertions of the plaintiffs, is unrestrained and often of a prejudicial nature and would be inadmissable evidence at a trial. All such information, particularly prejudicial information, that is widely

disseminated has the effect of making more difficult the selection of an impartial jury. Selection becomes particularly more difficult when statements of trial participants in particular are widely published. Thus in widely publicized or sensational cases, such as this criminal case, where the statements of trial participants are likely to appear in a widely disseminated manner, there is a substantial likelihood that prospective jurors are unwittingly exposed to statements constituting prejudicial inadmissable evidence that would jeopardize the defendants' right to a fair trial. To the extent that the Court has authority, it is the duty of the Court to prevent that kind of jury prejudice. This Court considered numerous factors pertaining to the extent and nature of the pretrial news coverage of this criminal case and considered whether other measures[6] would be likely to mitigate the effects of likely dissemination of unrestrained comment by the trial participants in this criminal case and concluded and remains convinced that the proscribed prejudicial extrajudicial statements of trial participants are likely to appear in a widely disseminated manner and that without such restraint upon the trial participants as imposed by the May 31st order, there is a substantial likelihood that the defendants would be denied a fair trial. Inasmuch as this Court has determined that the defendants' right to a fair trial is in substantial likelihood of jeopardy without the May 31st restraint on trial participants, the plaintiffs are not entitled to the relief they seek that the order be vacated and the May 31st order will continue to remain in full force and effect.

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[6] Although the ideal would be to place prospective jurors in sequestration prior to trial it is simply not practical.

The plaintiffs also contend that the May 31st order is vague and overbroad. Specifically, the plaintiffs contend that such terms as "mingling" and "the environs of the court" are not defined and that the order is capable of being read to prohibit conduct that could not reasonably be deemed to represent a threat to the defendants' right to a fair trial on the integrity of the Court. The term "mingling" is found in the second paragraph of the May 31st order and prohibits specified persons (trial participants) from "mingling or being in the proximity of reporters, photographers and others" (non-trial participants) while in the courthouse or on courthouse grounds. That paragraph of the order is no broader than necessary to its appropriate purpose to assure orderliness in and around the courthouse and to effectuate the ban on extrajudicial prejudicial statements by trial participants and the Court has the authority to issue such an order in these circumstances. See "Free Press-Fair Trial" at p. 410. Neither is the term "mingling" vague since it has understandable connotation that trial participants are to avoid situations or confrontations that might compromise the ban on their statements. The term "environs of the court," a term broad enough and specific enough to encompass the courthouse and its grounds which are expected to be fully utilized for this criminal proceeding, is found in paragraph three of the May 31st order which prohibits photographs[7] from being taken or sketch of any juror within the environs of the court. It must be noted that sketching is not prohibited per se, but only in so far as it relates to jurors. The reason for the limited ban on sketching jurors is that for the most part, jurors are new to the courtroom and have a very solemn duty to hear the evidence of the case. From past experience of juror complaints and this Court's own observations, the Court found that jurors are distracted and feel uneasy when they realize that they have become the subject of an artist. Certainly the Court has the authority to prevent activity which distracts the jury from their duty under law. See "Free Press-Fair Trial" at p. 411.[8] At this point, it should also be noted that this Court finds that there is no right by the plaintiffs as members of the press or the public in general to obtain the names and addresses of the prospective jurors in advance of trial as prohibited also by paragraph three of the May 31st order. The management of the jury is a function solely within the authority of the trial court and when the venire is called in open court, there is no question that upon the seating of a juror in a case that his identity will then become a public record.

Neither does the Court feel that the May 31st order unreasonably abridges any public right to know or media right to information since the right, if any, is not denied but merely delayed for a limited period. A defendant is only brought to trial after an indictment by a Grand Jury. The indictment is returned in open court and is a public record. The trial of a defendant is held in open court to

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[7] The ban on photographs is also consistent with Rule 53, F.R.Crim. P. which prohibits the taking of photographs in the courtroom during the progress of judicial proceedings and is also consistent with the general standing order of this Court issued May 14, 1969. Further, the plaintiffs admit in their reply brief they do not challenge the ban on photographs.

[8] While the Court is aware it has allowed unlimited sketching in other cases, those cases have not been the subject of extensive pretrial publicity as this criminal case or the subject of such public interest.

which all members of the public and media have a right to attend and hear the testimony of the witnesses. Finally, the May 31st order has no purpose or life beyond the trial of the case and no restriction upon any trial participant after the trial of the case. This Court's order unlike that issued in *CBS v. Young* (supra) which incidentally was a civil as opposed to a criminal case, is very limited in purpose time and people affected to assure the defendants a fair trial. It prohibits no conduct other than that which would in substantial likelihood jeopardize the defendants' right to a fair trial and is specifically and narrowly drawn to encompass only certain types of conduct. After the trial anyone can do or say anything they please but until that time comes, the provisions of the May 31st order will remain in full force and effect.

Finally, the plaintiffs contend that the May 31st order was issued without prior notice and hearing to the plaintiffs in contravention of their Fifth Amendment right to due process. This Court does not agree that the news media and public should be given notice and an opportunity to be heard before a Court should be permitted to issue such an order as the May 31st order.[9]

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[9] The plaintiffs cite *US v. Schiavo*, 504 F.2d 1 (3rd Cir. 1974) cert.den. sub. nom. *Ditter v. Philadelphia Newspapers Inc.*, 419 US 1096 for the proposition that they are entitled to prior notice and hearing. In *Schiavo*, the trial judge issued a collateral order in a criminal case directly against the press who were non-parties to the criminal case but parties to the collateral order since that order prohibited the press from publishing and reporting upon certain statements. The May 31st order in this case does not restrict the press from publishing or reporting at all and is only directed at the conduct of trial participants in the criminal case.

This Court, in imposing the restrictions of the May 31st order has followed the recommendations of the Kaufman Committee, "Free Press-Fair Trial" as adopted by the Judicial Conference of the United States and has not violated established legal concepts in implementing such order.

Accordingly,

IT IS ORDERED that the plaintiffs complaint be and the same is hereby dismissed. The May 31st 1976, order issued by this Court in *United States v. J. Ralph Gasque, et.al.*, No. 76-104 will continue to remain in full force and effect.[10] Let copies of this order be sent to the parties.

/s/ J. Robert Martin, Jr.
UNITED STATES DISTRICT JUDGE

TRUE COPY
Test:
MILLER C. FOSTER, JR., CLERK
/s/ Joyce Kirby
By: Deputy Clerk

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[10] It is of significant note that this Court, since the inception of this criminal case and forthcoming inquiries by the press, has continuously informed members of the press and public, some of who are plaintiffs to this complaint, that it will be available during the trial to clarify, explain or consider otherwise provisions of the May 31st order they deem necessitate such if they would make a presentation through an appropriate representative committee. Upon an appropriate inquiry, this Court will then examine any provision of the order that merits clarification, explanation or consideration otherwise in light of the requisites of the trial.

APPENDIX D

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James C. Harrison, Jr.
Costa M. Pleicones

May 24, 1977

Honorable J. Robert Martin, Jr.
United States Courthouse
Columbia, South Carolina 29201

In re: Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi, *et al.* v. The Honorable J. Robert Martin, Jr., *et al.*

Dear Judge Martin:

We understand that a jury has been selected and has been sequestered in the criminal trial of the Government vs. Ralph Gasque.

We therefore respectfully urge that, in consonance with the spirit of the Order of the Fourth Circuit Court of Appeals decided May 17, 1976, and in view of the Sequestration of the jury, reconsideration be given by the Court to all facets of its Order dated May 31, 1976.

Very truly yours,

HARRISON AND PLEICONES

By _____
James C. Harrison, Jr.

JCHjr/lfj
cc: Wistar D. Stuckey, Esquire
David R. Boyd, Esquire

No. 77-263

In the Supreme Court of the United States

OCTOBER TERM, 1977

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ET AL., PETITIONERS

v.

THE HONORABLE J. ROBERT MARTIN, JR., UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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CITATIONS

249-341—77——1

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–8a) is reported at 556 F. 2d 706. A prior opinion of the court of appeals (App. A, *infra*, pp. 1A–17A) is reported at 551 F. 2d 559.[1] The opinion of the district court (Pet. App. 9a–25a) is reported at 431 F. Supp. 1182.

[1] Petitioners have neglected to reproduce the court of appeals' first opinion. See Rule 23(1)(i) of the Rules of this Court. We have reprinted the opinion for the convenience of the Court as an appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1977. The petition for a writ of certiorari was filed on August 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court properly and consistently with the requirements of the First Amendment regulated statements by participants in a criminal trial.

2. Whether the district court's order was unconstitutionally overbroad or vague.

3. Whether the news media are entitled to notice and a hearing before a district court may issue an order regulating statements by participants in a criminal trial.

STATEMENT

An indictment returned in the United States District Court for the District of South Carolina charged J. Ralph Gasque, a South Carolina Senator, and two other persons with conspiracy to defraud the United States, filing false reports with the United States Department of Labor, and misapplication of federal funds. Trial was originally set for June 21, 1976.

On May 31, 1976, the district court (respondent Martin) issued an order (Pet. App. A) prohibiting, among other things, extrajudicial statements by any trial participant "which might divulge prejudicial matter not of public record in the case," and news interviews by any witness in the case "during the

trial period" (Pet. App. 1a). Petitioners are news organizations and journalists who moved to intervene in the criminal proceeding and to set aside this order. Petitioners argued that the order violated the freedom of the press and the Due Process Clause of the Fifth Amendment, which, they contended, required notice to them before issuance of the order.

On June 9, 1976, the district court denied petitioners' motion. Petitioners filed a notice of appeal, but the court of appeals dismissed petitioners' "attempted appeal from the district court's order" on the ground that they were not parties to the criminal action and therefore could not appeal from any order entered in that case (App. A, *infra*, p. 8A). The court treated the papers as a petition for a writ of mandamus, and it denied the petition on the ground that petitioners' right to the relief they sought was "far from clear and indisputable" (*id.* at 5A). The court also stated (*id.* at 1A–2A):

> It is clear, so far as this record now shows, that the criminal case involved was of great public interest and that it is easily classified as a widely publicized or sensational case as mentioned in the report of the Committee on the Operation of the Jury System * * *. The defendant Gasque, for example, was a State Senator and was in a campaign for reelection at the time the order was entered. Extensive press coverage followed the case.

The court suggested that petitioners could obtain review of the district court's order by filing a civil complaint in the district court (App. A, *infra*, pp. 8A–

12A). Petitioners accepted the suggestion and, on March 30, 1977, filed a complaint and motion for preliminary injunction challenging the original order of the district court.[2] On May 2, 1977, the district court dismissed the complaint (Pet. App. C). That court concluded that petitioners lack standing to assert the First and Fifth Amendment contentions they advanced and that, in any event, those contentions are without merit.

Petitioners appealed from this decision. On May 17, 1977, the court of appeals—again treating the papers as a petition for a writ of mandamus—held that petitioners have standing but denied the petition on the merits on the basis of the district court's opinion (Pet. App. B). The court modified the district court's order in two respects, which are not in issue here.[3]

The district court, in reasoning adopted by the court of appeals, explained that the criminal case was "widely publicized and sensational" (Pet. App. 20a) and that "the information contained in the media reports * * * is unrestrained and often of a prejudicial nature and would be inadmissible evidence at trial" (*ibid.*). The court concluded that "there is a substantial likelihood that the defendants would be denied a

[2] In the meantime, the criminal trial had been rescheduled to begin on May 23, 1977 (Pet. 7).

[3] The court of appeals held (Pet. App. 7a–8a) that the portion of the order prohibiting trial participants to "mingle" with reporters and photographers would apply only within the courthouse building and its entrances, and that the portion of the order barring photographing and sketching of jurors would apply only within the courthouse.

fair trial" (*id.* at 21a) unless it took some steps to prevent further comment by participants in the trial. The court held that its order "does not constitute a prior restraint on the press' or the public's right to speak or publish but only restrains the trial participants from certain conduct thereby proscribing the flow of prejudicial information to be gained by non trial participants" (*id.* at 19a). The court reasoned that a restraint on trial participants was authorized by this Court's decisions in *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, and *Sheppard* v. *Maxwell,* 384 U.S. 333, 361–362.

Petitioners' application to this Court for a stay of the district court's order was denied on May 23, 1977. 431 U.S. 928.[4] The criminal trial began on May 26, 1977. During the trial, the district court lifted the portion of the order that had prohibited the sketching of jurors in the courtroom.[5] The court also met with a committee of representatives of the press to discuss other possible modifications of the order.[6] The trial resulted in conviction of the defendants.[7]

ARGUMENT

Petitioners contend that this case presents important issues concerning the First Amendment right to

[4] Mr. Justice Brennan and Mr. Justice Marshall noted that they would have granted the stay.

[5] See Appendix B, *infra,* page 19A. Petitioners do not present any issue concerning the photographing and sketching provisions of the district court's order.

[6] *Ibid.*

[7] The conviction does not make this case moot. *Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 546–547.

report on criminal cases. There are, however, some fundamental differences between this case and *Nebraska Press Association* v. *Stuart*, 427 U.S. 539. The most important of these differences is that the district court's order is not directed to members of the press. It runs, rather, to the participants in the trial—lawyers, parties, witnesses, jurors and court officials—over whom the district court traditionally has exercised supervisory authority. No order here forbids the press to publish any information it may acquire. Moreover, the district court's order did not close any proceeding that is ordinarily open; the press was entitled to report on whatever happened in open court.

None of the persons described by the district court's order has protested its issuance. Whatever problems would arise if the defendants were to assert that they could not be prohibited from speaking out in their own defense therefore are not before the Court.[8] The question presented here, then, is whether in the circumstances of this case reporters' First Amendment rights were infringed by the order direct-

[8] It may be quite difficult to justify an order restraining comment by defendants. The indictment is a public charge of crime, and the defendants have a legitimate interest in conveying to the public their response to such a charge. See generally Freedman and Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi* v. *Obiter Dictum*, 29 Stan. L. Rev. 607 (1977). The court of appeals was sensitive to these concerns, and it expressed no opinion concerning the propriety of the district court's order as it applied to the defendants (Pet. App. 7a). It pretermitted consideration of this issue because the defendants did not object to the order or indicate that they desired to make public statements.

ing third parties not to grant interviews or divulge potentially prejudicial matter to petitioners.[9]

1. *a.* The order at issue in *Nebraska Press Association* forbade reporters to publish information that was legitimately in their possession. The state court entered that order without making any finding that other measures would have been inadequate to protect the accused's rights (427 U.S. at 563). This Court held that the extraordinary step of forbidding publication of information already in the public domain could not be justified by anything less than extraordinary danger to the defendant's rights. See also *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308.

The Court has recognized an important distinction, however, between the right to publish news and the right to gather news. The "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel* v. *Rusk*, 381 U.S. 1, 17. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to informa-

[9] We agree with the court of appeals (Pet. App. 6a) that petitioners have standing to assert whatever right to gather information they may have, provided that they can establish that the district court's order denied them access to information that would otherwise be available to them. The press asserts a claim of access peculiar to itself; petitioners are therefore the appropriate parties to present a claim of a right of "access" to news sources. Petitioners have standing here for the same reasons the press had standing to present the "access" claim in *Pell* v. *Procunier*, 417 U.S. 817, and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843. This conclusion, however, does not mean that there is a right of access in cases of this sort; it means only that petitioners are appropriate persons

tion not shared by members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817, 834.[10]

Petitioners do not contend that the district court's order has denied them access to information otherwise available to the general public.[11] They argue, rather, that unless they have greater access to information than the public generally they will be unable to report effectively on the case.[12] They rely upon the unquestioned principle that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681. But this principle, although important, has its limits, some of which were discussed in *Pell*, where this Court rejected a claim by the media to preferen-

to litigate whether there is such a right. For the reasons stated in the text, we submit that the strength of petitioners' arguments is substantially diminished by the fact that the district court's order does not operate directly on them.

[10] See also *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 850. This principle is especially compelling when the Fifth and Sixth Amendment rights of defendants to a fair trial are implicated. See, *e.g.*, *United States* v. *Gurney*, 558 F. 2d 1202 (C.A. 5) (press may be denied access to grand jury transcripts, bench conferences, and other private communications); *Garrett* v. *Estelle*, 556 F. 2d 1274, 1277 (C.A. 5).

[11] Only paragraph four of the district court's order (Pet. App. 1a), which applies to "news interviews," might be read as distinguishing between the press and other interested persons. But that paragraph simply rephrases the requirement of paragraph one that no participant in the trial disclose "prejudicial matter not of public record in the case."

[12] Petitioners' arguments in this regard share features in common with those presented by the press in *KQED, Inc.* v. *Houchins*, 546 F. 2d 284 (C.A. 9), stay issued, 429 U.S. 1341 (Rehnquist, J., in chambers), certiorari granted, 431 U.S. 928, argued November 29, 1977, in which the court of appeals held that the press is entitled to access to a prison greater than the access afforded to the general public. We believe, however, that questions concerning the right of the press to obtain information from trial participants are sufficiently different from questions presented by requests for access to physical facilities that there is no need to hold this petition pending the disposition of *Houchins*.

tial access to information in the possession of the government.[13]

Criminal defendants have important interests in receiving a fair trial; the public has important interests in speedy and effective prosecution of criminal charges. These interests are especially strong in sensational or widely publicized cases, for publicity of prejudicial information may make it more difficult to hold a fair trial. This Court therefore recognized in *Sheppard* v. *Maxwell*, 384 U.S. 333, 361–362, that participants in the trial could be subject on appropriate occasions to special restraints designed to ensure that any trial would be a fair one. The Court reaffirmed *Sheppard* in *Nebraska Press Association* v. *Stewart*, *supra*, 427 U.S. at 553–554, 564.[14] Mr. Justice Brennan, concurring in the judgment in *Nebraska Press*, also stated that courts "may stem * * * the flow of prejudicial publicity at its source, before it is obta ed by representatives of the press" (*id.* at 601). Mr. Justice Brennan stated, correctly in our view, that as "officers of the court, court personnel and at-

[13] The information in the possession of defendants, attorneys and witnesses cannot, of course, be equated with information in possession of the government, and the principle of *Pell* therefore does not apply directly to this case. But the court has a special interest in the information possessed by attorneys and others, and this interest, when coupled with a threat to a defendant's right to a fair trial, authorizes the court to issue a "no comment" order.

[14] The Court noted, however, that it was not presented with any question concerning such restraints (427 U.S. at 564 n. 8).

torneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases * * * and to impose suitable limitations whose transgression could result in disciplinary proceedings" (*id.* at 601 n. 27).[15]

Superviory limitations on public statements by participants in a criminal trial are a less sweeping palliative than prior restraints on the press. Limited-duration orders, which ultimately do not prevent public access to any information, should be permitted when they are reasonably necessary, in light of this Court's statement in *Sheppard* that courts must take strong measures to protect the rights of the accused. The Judicial Conference of the United States has recommended that district courts promulgate rules that would authorize orders like the one issued by the district court here,[16] and such rules are a reasonable accommodation of the competing interests.

The courts below adopted this practical accommodation in the instant case, reserving the use of such orders to cases in which there is a reasonable likelihood that publicity will interfere with the defendant's right to a fair trial. Two other courts of appeals have

[15] A court also has substantial authority over witnesses. *Geders* v. *United States*, 425 U.S. 80, 87.

[16] *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391. See also Taylor, *Two Studies in Constitutional Interpretation* 117–173 (1969).

adopted a similar test. *Farr* v. *Pitchess*, 522 F. 2d 464, 468 (C.A. 9), certiorari denied, 427 U.S. 912; *United States* v. *Tijerina*, 412 F. 2d 661, 666 (C.A. 10), certiorari denied, 396 U.S. 990. Cf. *United States* v. *Gurney*, 558 F. 2d 1202 (C.A. 5).[17]

The Sixth and Seventh Circuits, however, have adopted a different test. The Sixth Circuit has indicated that an order prohibiting the discussion of a pending case by the parties concerned could be sustained only if it were "required to obviate serious and imminent threats to the fairness and integrity of the trial." *CBS, Inc.* v. *Young*, 522 F. 2d 234, 240 (C.A. 6). The Seventh Circuit has indicated that a "no comment" rule can be sustained only when comments "pose a 'serious and imminent threat' of interference with the fair administration of justice * * *." *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242, 249 (C.A. 7), certiorari denied *sub nom. Cunningham* v. *Chicago Council of Lawyers*, 427 U.S. 912.

Both *CBS* and *Chicago Council of Lawyers* involved situations significantly different from the facts of this case; there is no adequate reason to believe that those courts, applying their standards, would have decided the present case in petitioners' favor.[18] Moreover, additional experience in the lower federal courts with problems like the present one would be

[17] See also *United States* v. *Haldeman*, 559 F. 2d 31, 63 and n. 39 (C.A. D.C.) (*en banc*), certiorari denied *sub nom. Ehrlichman* v. *United States*, 431 U.S. 933 (referring to a "no comment" order as "appropriate" but not discussing the standard for the issuance of "no comment" orders).

[18] In *Chicago Council of Lawyers*, the lawyers themselves—the objects of the restraint—challenged a broad "no comment" rule

helpful in establishing whether the different verbal formulations—"reasonable likelihood" of prejudice versus "a serious and imminent threat" of prejudice—produce different results in practice. The Court's denial of certiorari in both *Farr* and *Chicago Council of Lawyers* after it had decided *Nebraska Press Association* permitted such development and experience to continue. There is no greater reason to grant review now than there was in those cases.[19]

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that applied to all pending cases, civil and criminal, without any showing that publicity would jeopardize the possibility of a fair trial in any particular case. Moreover, the rule posed serious notice problems, since it was difficult for the attorneys in any particular case to know with assurance whether the rule's strictures applied. By contrast, no attorneys are challenging the instant order, which was applied to only a single criminal case when the occasion arose, and which affords specific notice to the affected persons.

CBS was a civil rather than a criminal case, and the district court's sweeping order applied not only to the parties and their attorneys but also to their relatives, friends, and associates. The court of appeals concluded that a "more restrictive ban upon freedom of expression in the trial context would be difficult if not impossible to find" (522 F. 2d at 239). See also *United States* v. *Gurney*, *supra*, 558 F. 2d at 1208 n. 8 (sustaining a restraint on access by the press to information and distinguishing *CBS*). The need for "no comment" orders is at its greatest in notorious criminal cases such as this one, and the order is most easily sustainable when, as here, it is limited to the parties, their attorneys, and the witnesses, and when the restraint involves only discussion of "prejudicial matter not of public record" (Pet. App. 1a).

[19] Both *CBS* and *Chicago Council of Lawyers* were decided before this Court's decision in *Nebraska Press Association*, and it may be that the Sixth and Seventh Circuits would revise their criteria for the issuance of "no comment" orders in light of this Court's opinion, if given the occasion to do so. It would be premature to assume that any apparent conflict among the circuits will persist.

b. Petitioners argue (Pet. 18-22) that the circumstances of this case do not support the issuance of the district court's order even under the "reasonable likelihood of prejudice" standard employed by the courts below. Both lower courts reached a contrary conclusion, however, and there is no reason for this Court to review that essentially factual decision concurred in by two courts—especially because only the nature of the legal issue prevents this case from being moot (see note 7, *supra*). The district court found that the criminal case involving Senator Gasque was "widely publicized and sensational [in] nature," that there had been "numerous and extraordinary inquiries made by representatives of the press and news media to this Court" about the case, and that the media reports so far had been "unrestrained and often of a prejudicial nature," containing information that "would be inadmissible evidence at trial" (Pet. App. 20a). These findings, coupled with the court's additional determination that other measures would not be "likely to mitigate the effects of unrestrained comment by the trial participants in the criminal case,"[20] supported

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[20] The court noted, for example (Pet. App. 21a n. 6), that it was "simply not practical" to sequester the prospective jurors before trial. Although the court sequestered the jury at the start of trial, that action did not destroy the reasonableness of its order restricting pretrial communications by the trial participants. The need to restrict extrajudicial comments continued even during trial. As the Seventh Circuit said in *Chicago Council of Lawyers* v. *Bauer*, *supra*, 522 F. 2d at 256, the contrary "view assumes that a trial judge will never change his mind and release a sequestered jury. Then, there is always the possibility that an unedited newspaper or broadcast might reach even a sequestered juror."

its conclusion that there was a reasonable likelihood of prejudice to the accused in the absence of an order restricting comment by the trial participants.

2. Petitioners contend (Pet. 22–23) that the district court's order was unconstitutionally overbroad and vague. Although the ban on communications that "might divulge prejudicial matter not of public record in the case" (Pet. App. 1a) might have been made more specific by a delineation of the categories of information that would be prejudicial, petitioners were not harmed by the lack of specificity. Petitioners were not the addressees of the order; petitioners were not required to guess, at their peril, whether particular statements would be prejudicial, and in these circumstances petitioners are not entitled to invoke the rights of the defendants and their attorneys, who have not objected to the order or contended that it left them uncertain about what they could say. Petitioners do not contend that anyone subject to the order expressed concern about its vagueness as a reason for not providing information he otherwise would have provided. Moreover, petitioners could have asked the district court to clarify its order. Whatever vagueness terms such as "mingling" and "environs of the Court" may have possessed originally, they did not create uncertainty when read in the context of the remainder of the order (the focus of which was upon "statements" to or "interviews" with non-participants in the trial) and the narrowing construction of the court of appeals (see note 3, *supra*).

3. Finally, petitioners contend that they were entitled to notice and a hearing before the district court issued its order. We assume *arguendo* that the addressees of the order—defendants, attorneys, witnesses and court personnel—would be entitled to a hearing before they could be instructed not to discuss the case. But petitioners, who are only vicariously interested in the consequences of "no comment" orders, have no personal right to a hearing, because they are not directly affected by the order and would not be subject to sanctions under any conditions. Only those who might be subject to contempt for disobedience would be entitled to a prior hearing.[21] *United*

[21] Petitioners argue only that a district court has an obligation to afford a prior hearing to "the press" in every case. But such a requirement would impose a difficult task on the court, including identifying those to whom notice would be given and to whom a hearing would be offered. Who is "the press" entitled to notice and a hearing? Because all persons possess the same right to observe and speak, any attempt to restrict the notice and hearing to a small group would itself pose constitutional problems. How and to whom must notice be given in a trial that may be of nationwide interest? Must a district judge speculate about the identity of persons who might be interested in reporting on the trial? Must the court give advance notice even when the delay between notice and the hearing, and the holding of the hearing itself, might afford both opportunity and incentive for the making of the very prejudicial comments that the court sought to avert?

The "no comment" order issued by the district court was a public order, and the issuance of the order thus gave general "notice" of its contents. It is difficult to see how more particularized notice could have been provided. Once the order was issued, the district court met with attorneys for petitioners promptly. This offered petitioners an opportunity to make their objections and arguments known. It could be argued that members of the press have a right to such an opportunity, perhaps even to a more formal opportunity, to make their objections and attempt to establish that the order unnecessarily restricted their access to information. But

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States v. *Schiavo*, 503 F. 2d 1 (C.A. 3) (*en banc*), certiorari denied *sub nom. Ditter* v. *Philadelphia Newspapers, Inc.*, 419 U.S. 1096, upon which petitioners rely, involved a prior restraint on publication, and that case therefore involved quite a different problem. The present case is the first that has considered the need for a hearing to be afforded to persons not themselves the addressees of the orders, and there is no conflict among the circuits on that question. As the district court noted here (Pet. App. 24a n. 9):

> In *Schiavo*, the trial judge issued a collateral order in a criminal case directly against the press * * * [which] prohibited the press from publishing and reporting upon certain state-

petitioners, which did not request any more formal hearing in the district court, do not make such an argument. It might be appropriate for the lower courts to explore the question whether such prompt hearings would sufficiently protect the rights of reporters who contend that they are injured by "no comment" orders, but the issue is not open for decision in the present case. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 and n. 9.

The press also would have a strong argument in an appropiate case that district courts should not be allowed to issue "no comment" orders without stating reasons why the orders are necessary. Cf. Fed. R. Civ. P. 65(d) ("every restraining order shall set forth the reasons for its issuance"). Findings would facilitate prompt appellate review of "no comment" orders and might assist the parties in the conduct of any later hearing to determine whether the order should be modified. The United States would not oppose a suggestion that appellate courts should, in the exercise of their supervisory powers, require a statement of reasons for the issuance of each "no comment" order. But the court of appeals did not pass on that question, and this case therefore does not present it for decision by this Court.

> ments. The May 31st order in this case does not restrict the press from publishing or reporting at all and is only directed at the conduct of trial participants in the criminal case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

No. 76-1757

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ET AL., APPELLANTS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA ET AL., APPELLEES

Argued Sept. 1, 1976—Decided Jan. 13, 1977

Before CRAVEN, RUSSELL and WIDENER, Circuit Judges

WIDENER, *Circuit Judge:* The district court, in the criminal case of *United States* v. *J. Ralph Gasque, et al.,* No. 76-104, in the District of South Carolina, entered an order, previous to the trial, which has not yet been held, regulating the conduct of the participants in the trial and the conduct and seating of the press in the courtroom.

From this order, Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi, (Society) appeals those parts regulating the conduct of the participants in the trial and the conduct of the press in the courtroom.

It is clear, so far as this record now shows, that the criminal case involved was of great public interest and that it is easily classified as a widely

publicized or sensational case as mentioned in the report of the Committee on the Operation of the Jury System hereinafter referred to. The defendant Gasque, for example, was a State Senator and was in a campaign for reelection at the time the order was entered. Extensive press coverage followed the case.

The order, set out in the margin,[1] prohibited participants in the trial, including lawyers, parties, witnesses, jurors, and court officials from making "extrajudicial statements which might divulge prejudicial matter not of public record," and from "mingling with or being in proximity" to reporters and photographers in the environs of the court. It prohibited the release of names and addresses of prospective jurors, and the sketching or photographing of jurors within the environs of the court. It prohibited witnesses from news interviews during the trial period.

[1] The order reads in pertinent part as follows:

"For reasons appearing to the Court, it is Ordered that the above case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further Ordered that

"(1) Extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.

"(2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during recesses in the trial.

"(3) The names and addresses of prospective jurors are not to be released except on Order of Court, and no photograph shall be taken and no sketch made of any juror within the environs of the Court.

"(4) All witnesses are prohibited from news interviews during the trial period.

"(5) The United States Marshall at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,

(a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.

(b) Allocation of seats to the news media representatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

The Society did not contest the validity of section five of the order.

Pursuant to Rule 21(b) of the Federal Rules of Appellate Procedure, we entered an order permitting the district judge and the parties to the criminal action to respond to the purported appeal, for which purpose we treated the papers as a petition for mandamus. The Society is not a party to the criminal prosecution. Pursuant to 28 U.S.C. § 1651, we also entered a stay of the order.

We think the answer of the district judge correctly points out that we should not grant relief upon the petition for mandamus. We, therefore, vacate the stay, and, for reasons indicated below, dismiss the appeal.

This court may issue all writs "necessary or appropriate in aid of [its] * * * jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651. But the traditional use of the writ of mandamus under the All Writs Act, "in aid of appellate jurisdiction * * * has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1942). In issuing this order, the district judge neither exceeded nor refused to exercise jurisdiction. The most

that the Society can claim is that he has erred in matters within his jurisdiction. Extraordinary writs do not reach to such cases. *Parr* v. *United States,* 351 U.S. 513, 520, 76 S. Ct. 912, 100 L. Ed. 1377 (1955).[2]

A writ of mandamus is not a substitute for an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable. *United States* v. *Wilbur,* 283 U.S. 414, 420, 51 S. Ct. 502, 75 L. Ed. 1148 (1930). It has been said that the writ of mandamus will not issue to compel an act involving the exercise of judgment and discretion, *Louisiana* v. *McAdoo,* 234 U.S. 627, 633, 34 S. Ct. 938, 58 L. Ed. 1506 (1913), and that a Court of Appeals cannot use the writ to actually control the decision of the trial court, *Platt* v. *Minnesota Mining Co.,* 376 U.S. 240, 84 S. Ct. 769, 11 L. Ed. 2d 674 (1964), although the standard at least once has been stated in this court as abuse of discretion. *Akers* v. *N&W Ry.,* 378 F.2d 78 (4th Cir. 1967).

The order issued by the district judge was a result of his judgment that it was necessary to protect the

[2] See also *Will* v. *United States,* 389 U.S. 90, 98, n. 6, 88 S.Ct. 269, 275, 19 L.Ed.2d 305 (1967):

"* * * Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.' *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U.S. 212, 223, 225, 65 S.Ct. 1130, 1136, 89 L.Ed. 1566 (1945)." (dissenting opinion of Mr. Justice Douglas).

defendant's right to a fair trial. We do not reach the merits of the order and we express no opinion concerning its validity. We note only that it involved the exercise of judgment by the district court on a question not nearly conclusively settled in law, especially adversely to the opinion of the district court, that is, whether, rather than prohibiting the press from publishing information already obtained, ***which the district court did not do, and which may only be done in extraordinary circumstances*** not shown to be present here, it may indirectly prevent the press from obtaining information by regulating trial procedures and ordering the trial participants not to speak with members of the press.

In view of *Sheppard* v. *Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), *Nebraska Press Assoc.* v. *Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), and *Pell* v. *Procunier,* 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1973), the Society's right to relief from the order is far from clear and indisputable. Even considering abuse of discretion to be the standard, that has not been shown. Thus, we do not grant relief on the petition for mandamus.[3]

[3] We note that in *Chase* v. *Robson,* 435 F. 2d 1059 (7th Cir. 1970), the court held that mandamus was proper to review an order issued at the time of pre-trial motions in a criminal prosecution. That order, similar to the one before us, prohibited counsel and defendant from making statements concerning the trial to the press. The court held the order constituted a clear abuse of discretion and thus was a proper subject for mandamus. The opinion points out that the defendant in the criminal case was a petitioner and should not be required to await conviction and appeal. In the case before us, the defendant in the criminal case makes no objection to the order complained of. Whether he may validly complain is not a case before us, and we express no opinion

In *Sheppard,* the Supreme Court suggested several remedial procedures to prevent prejudicial publicity:

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on the question. *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971), involved a similar question decided in the context of an attorney's disciplinary proceeding.

In *CBS, Inc.* v. *Young*, 522 F. 2d 234 (6th Cir. 1975), the court granted mandamus in a situation more analogous to that existing here. In the case of *Krause* v. *Rhodes*, a widely publicized case, the trial court had ordered that counsel, court personnel, parties and the parties' relatives, close friends, and associates to refrain from discussing in any manner whatsoever the case. The court ordered the district court to vacate this order, holding that the standard was that the activity restrained must pose a clear and present danger or a serious or imminent threat to a protected or competing interest, p. 238, which, of course, would be the right to a fair trial.

Chase, *Oliver*, and *CBS* were followed by *Nebraska Press Association* which not only cited *Sheppard* with approval, it added emphasis to the fact that "*the trial courts must take strong measures to ensure that the balance is never weighed against the accused.*" 427 U.S. p. 553, 96 S. Ct. p. 2800. And included in the quotation from *Sheppard* by the *Nebraska* court is the standard that "* * * where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," the judge should continue the case, transfer it, sequester the jury, or see that neither "the accused, witnesses, court staff, nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." p. 553, 96 S. Ct. p. 2800.

We construe the *Nebraska* opinion, so far as it may be read to permit the previous restraint of information already in the hands of the press, to require a clear and present danger to a fair trial. See *Near* v. *Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931). But where the trial court finds there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, although there may be no clear and present danger, we think the court in *Nebraska* has approved the standard set out in *Sheppard*, and that the order of the district judge here in question has not been shown on this record to violate the *Sheppard* standard as it regulates the conduct of the participants in the trial.

closely regulating conduct of newsmen in the courtroom, insulating witnesses, and proscribing "extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests * * * the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." 384 U.S. at 361, 86 S. Ct. at 1521. Thus, we see that, on its face, the district court's order falls within the *Sheppard* prescription. The Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391, especially 404–13, is of like effect.

In *Nebraska Press Assoc.* v. *Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), the Court struck down an order *restraining publication* of confessions, admissions, or facts "strongly implicative" of the accused in a widely reported murder of six persons. The order also prohibited reporting or commentary on judicial proceedings held in public. But, in so doing, it did not overrule *Sheppard.* Indeed, the Court cited with approval several passages from the *Sheppard* opinion, including the following:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused*
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> * * * * *

> *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming within the jurisdiction of the court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." [Emphasis added by the Court in *Nebraska*].

Finally, in *Pell,* the press challenged a regulation by the California Department of Correction on first amendment grounds. The regulation prohibited interviews with specific individual inmates. The Supreme Court upheld the regulation, saying: * * * "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 417 U.S. at 833, 94 S. Ct. at 2810. From these cases, it can be seen that the Society's right to the relief it seeks is far from clear and indisputable.

We also dismiss the Society's attempted appeal from the district court's order. It is clear that the Society should not participate in a case to which it is not a party. Even in civil cases, intervention requires an interest in the transaction or property before the court. FRCP 24. But the Society has no interest in the determination of the defendant's guilt or innocence to justify its intervention. Moreover, there is no counterpart to intervention in the criminal law or rules.

But it has been suggested that in keeping with the spirit of the Federal Rules,[4] we now treat the Society's motion for a stay in the district court as a complaint initiating an action against the district court's order, that is, that we treat this case as one which may be initiated on motion without a complaint. See *Di Bella* v. *United States,* 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1961); *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1930); *Cogen* v. *United States,* 278 U.S. 221, 49 S. Ct. 118, 73 L. Ed. 275 (1928).

[4] *Foman* v. *Davis*, 371 U.S. 178, 181–82, 83 S. Ct. 227, 230, 9 L. Ed 2d 222 (1962), suggests that decisions on the merits should not be based on the technicalities of procedures of pleading:

In *Go-Bart,* the Supreme Court permitted a third person to make a motion in a criminal case for return of his illegally seized property, even though the movant was not a defendant, himself, and had no stake in the defendant's guilt or innocence. Rule 41(e)[5] of the Federal Rules of Criminal Procedure is not inconsistent with the *Go-Bart* procedure and authorizes the court to proceed on the motion without a complaint. But the situation described in Rule 41(e) is different in every respect from the situation here. The court does not have in its custody property belonging to the Society.[6] No illegal search or seizure has been

> "* * * The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley* v. *Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action'."

[5] (e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . .

[6] In *Austin* v. *United States*, 297 F. 2d 356 (4th Cir. 1961), this court on a Rule 41(e) motion by a defendant in a criminal case considered the suppression of evidence, prior to indictment, that

made. To allow a proceeding by motion in this case under Rule 41(e) would not advance the purpose of that Rule, which was to implement the exclusionary rule. See *Jones* v. *United States,* 362 U.S. 257, 260, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

Finally, we think Justice Black's opinion in *New Hampshire Fire Ins. Co.* v. *Scanlon,* 362 U.S. 404, 80 S. Ct. 843, 4 L. Ed. 2d 826 (1959), is persuasive against extending this procedure to cases which do not precisely fall within Rule 41(e) because the proceeding initiated on motion without a complaint is a summary procedure. In *New Hampshire Fire,* the Internal Revenue Service, in order to collect unpaid taxes, levied on a debt allegedly owed by the City of New York to the taxpayer. Rather than file a complaint, the insurance company filed a petition in the district court to quash the levy arguing that the debt was owed not to the taxpayer but to the insurance company. The Supreme Court was unwilling to let the insurance company bring its claim by way of petition and summary procedure, although an ordinary civil suit would have been filed:

> "* * * [T]he Federal Rules of Civil Procedure, 28 U.S.C.A., provide the normal course for beginning, conducting and determining controversies. * * * Rule 3 provides that 'A civil action is commenced by filing a complaint with the court.' * * * Other rules set out in detail

was not tangible personal property, but was, instead, information acquired from the defendant through the allegedly fraudulent and deceitful practices of IRS agents. The court held that such information may be suppressed, but that decision brings this case no closer to a Rule 41(e) motion. The Society is not seeking to suppress any of the evidence in Senator Gasque's trial, nor has it given any information to enforcement officers under fraudulent or deceitful circumstances.

> the manner, time, form and kinds of process, service, pleadings, objections, defenses, counterclaims and many other important guides and requirements for plenary civil trials. The very purpose of summary rather than plenary trials is to escape some or most of these trial procedures. Summary trials, as is pointed out in the petitioner's brief, may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even ex parte. * * * In the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law.
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> * * * * *
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> "It is true that courts have sometimes passed on ownership of property in their custody without a plenary proceeding where, for illustration, such a proceeding was ancillary to a pending action or where property was held in the custody of court officers, subject to court orders and court discipline. See, e.g., *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 355, 51 S. Ct. 153, 157, 75 L. Ed. 374. But here there is no situation kindred to that in *Go-Bart.* What is at issue here is an ordinary dispute over who owns the right to collect a debt—an everyday, garden-variety controversy that regular, normal court proceedings are designed to take care of." 362 U.S. at 406–407, 409–410, 80 S. Ct. at 845.

The Society has shown no reason why its claim should be determined in a summary proceeding. Nor do we find any authorization for so treating it. We realize that questions concerning press coverage deserve timely consideration. See, *Nebraska,* 427 U.S. at 539, 96 S.Ct. 2791, yet no reason is shown why that might not otherwise be attained than by the dis-

ruption of a criminal trial. Our stay order has insured continuity of such rights thus far.

We are of opinion, therefore, that this case should not be treated as one initiated by motion without complaint. Since we find nothing in the criminal law or rules permitting the Society to intervene in this case, to introduce collateral issues, and to disrupt the pending criminal trial, we dismiss the appeal.

We emphasize that anything we have said touching the merits of the orders entered by the district court is to illustrate that the claim that the district court had a duty not to enter the order is not so clear as to warrant mandamus and is not a holding that the claim of the Society necessarily has no merit. We express no opinion on that question. If a separate suit is appropriate by the Society, our opinion here should not be construed as making that matter *res judicata* upon a proper record. We do not treat this as a garden variety case.

In conclusion, treating the papers filed as a petition for mandamus, the petition is denied; treating the papers filed as an appeal from the orders of the district court, the appeal is dismissed. It follows that our stay previously entered is dissolved.

CRAVEN, *Circuit Judge,* concurring and dissenting: I regret very much that we cannot decide the merits of this confrontation between fair trial and free press, but I agree with my brothers that because the facts have not been developed in the district court we could write, at most, an advisory opinion.[1] I would not, however, dismiss the appeal, but would, instead, hold that there is appellate jurisdiction and remand to the district court for a trial on the merits with instructions that the district court then find facts as required by the Seventh Circuit in *Chase* v. *Robson,* 435 F. 2d 1059 (1970).

[1] Although my brothers disclaim deciding the merits, they nevertheless construe *Nebraska Press Assoc.* v. *Stuart, supra,* as approving the standards of *Sheppard* v. *Maxwell, supra.* Since they have done so, I am compelled to express my disagreement, but the time for an exposition of it is not yet, and, because of dismissal, will be a little longer coming.

I.

I respectfully dissent from my brothers' decision to dismiss the appeal on the ground that "the Society should not participate in a case to which it is not a party." *Supra* at p. 563.

The court has embraced uncritically the doctrine that non-parties lack standing to appeal, so that the Society, not being a party to the criminal action, cannot appeal from an interlocutory order therein, however damaging its effect upon their First Amendment interests. Professor Moore formulates the basic idea less categorically: "*Ordinarily,* only a person who was a party in the court below and who is aggrieved by the judgment or order can appeal therefrom." 9 Moore's Federal Practice ¶203.06, at 715 (1975) (emphasis added). His adverb admits of exceptions—and exceptions there both are and must be if we are not to lose sight of the very purpose behind this judge-made rule. See *West* v. *Radio-Keith Orpheum Corp.,* 70 F. 2d 621, 623 (2d Cir. 1939); *United States* v. *Schiavo,* 504 F. 2d 1 (3d Cir. 1974); and *Overby* v. *United States Fidelity & Guaranty Co.,* 224 F. 2d 158 (5th Cir. 1955).

The rule embodies the generally valid assumption that non-parties, as to whom final decisions are not res judicata, do not have a sufficient interest in the controversy to lodge an appeal. Ordinarily, they have *nothing* at stake, for the law has never recognized

a philosophical concern as a legal interest. *Bodkin* v. *United States*, 266 F. 2d 55 (2d Cir. 1959). *See Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L. Ed. 2d 636 (1972), and *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L. Ed. 2d 663 (1962). As such, the party-only appeals rule merely reflects an early approach to the "case or controversy" requirement of Article III of the Constitution—and, more particularly, to that subclass of jurisdictional concerns commonly known as "standing" to litigate. *See West* v. *Radio-Keith-Orpheum Corp., supra*, 70 F. 2d at 623, Wright, Miller & Cooper, Federal Practice & Procedure, § 3531 (1975). But where the assumption that only parties are interested is not true and a non-party *is* aggrieved, we are free to exercise our constitutional and statutory jurisdiction. This is especially so since on its face our jurisdictional statute, 28 U.S.C. § 1291, does not limit appeals to parties, but contemplates appeals from all final decisions.

As Learned Hand observed in *West* v. *Radio-Keith-Orpheum Corp., supra*, 70 F. 2d at 624:

> The reason for [the party-only appeals doctrine] is that if not a party, the putative appellant is not concluded by the decree, and is not therefore aggrieved by it. ***But if the decree affects his interests, he is often allowed to appeal.***

[Emphasis added.] Accordingly, in a case like this one, the Third Circuit allowed the media to appeal from a "gag" order entered in a criminal case. *United States* v. *Schiavo, supra.*

The basic question of standing to litigate should be directly faced. It should not be avoided by resort to an inaccurate and outmoded presumption that nonparties cannot be harmed by what happens in some-

one else's lawsuit. No court has seriously questioned the litigable interest of the media in contesting a "gag" order. For instance, in *C.B.S., Inc.* v. *Young*, 522 F. 2d 234 (6th Cir. 1975), *supra* at p. 562 n. 3, in which the gag order ran solely against the parties, the court found that the local media was clearly aggrieved thereby:

> Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives. To that extent their protected right to obtain information concerning the trial is curtailed and impaired.

522 F. 2d at 239.[1] And despite my own fearful concern over the abuse of the "standing" requirement to avoid hard questions, I am confident here that not even a tortured application of that concept can plausibly deny the Society standing to litigate on appeal the validity of this "gag" order—or, which is the same thing, to have brought an original action in this regard. Compare *Tileston* v. *Ullman*, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943), with *Eisenstadt* v. *Baird*, 405 U.S. 438, 443–46, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). Indeed, by discussing the merits of the Society's mandamus petition, the court itself has impliedly and rightly resolved the basic question in appellant's favor.

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[1] That conclusion, of course, applies here *a fortiori* since paragraph (3) of the court's order, banning all photographing and sketching at trial, runs *directly* against the press; and, arguably, so does paragraph (4), banning news interviews by participants. *See* p. 56, *supra*.

II.

Accepting the court's opinion on its own terms, there is no reason why we may not properly treat the Society's motion for a stay in the district court as a complaint initiating an action against the district court's promulgation of "gag" rules. Despite Rule 7(a), a complaint is a complaint whether or not the word complaint appears on the paper writing. Indeed, Rule 8 of the Federal Rules of Civil Procedure talks about "claims for relief" and specifically provides that pleadings shall be construed so as to do substantial justice. I do not believe that any federal court would today hold that a complaint may be dismissed purely because it is not denominated as such, and I do not think the majority opinion goes quite so far. But if it does not, I fail to see why my brothers are unwilling to treat the motion for a stay as a complaint purely for purposes of appellate jurisdiction. I am sensitive to the thought that the harassed and overburdened district judge probably did not think of the motion as a complaint, but remand, with an instruction to treat it as such, prejudices neither him nor anyone else and would save a lot of wasted motion, time, and money.

Aside from whether the paper writing was given its proper name below, there is authority for the proposition that some causes of action can be begun without any complaint. The Supreme Court has twice so held: *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931); *Cogen* v. *United States,* 278 U.S. 221, 225, 49 S. Ct. 118, 73 L. Ed. 275 (1929). *See* 2 Moore's Federal Practice ¶ 3.04 (1975). I think this is such a case.

III.

Since it seems to me there is appellate jurisdiction on any of the above theories, I am not much concerned that my brothers conclude that mandamus does not lie. But both the Sixth and Seventh Circuits have concluded otherwise, as my Brother Widener recognizes. *Chase* v. *Robson,* 435 F. 2d 1059 (7th Cir. 1970); *In re Oliver,* 452 F. 2d 111 (7th Cir. 1971); *C.B.S., Inc.* v. *Young,* 522 F. 2d 234 (6th Cir. 1975).

IV.

This is one of those unfortunate procedural decisions that is of no help to anyone and really does not matter except in terms of delay. I think we can safely assume (unless their clients' money is exhausted) that as soon as counsel learn of our dismissal they will simply take the motion for a stay previously filed in the district court, perhaps change it a little and denominate it a "complaint," and file it and have it served on the judge. If the judge then denies a motion for a stay of his "gag" rules, counsel will then again ask this court for a Rule 8 stay order and will again appeal. And around we will go again. Today's decision not to proceed is the kind of expensive non-decision point that provokes Professor Frank to wonder if the elephant has not become too large to stand on his pedestal, and causes him to recommend that:

> All rules or statutes governing procedure should be carefully analyzed to ensure that their application *will not take undue court time or add to the cost of litigation.* The presumption in favor of economy and speed is rebuttable where fairness is at stake, but it is a strong presumption all the same.

J. Frank, American Law 69, 85, 90 (1969) [Emphasis added.]

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH CAROLINA,
Greenville, S.C., 29603,
September 15, 1977.

Re: *Central South Carolina Chapter* v. *Martin*
Honorable THOMAS E. LYDON, Jr.,
United States Attorney,
United States Court House,
Columbia, South Carolina 29202

DEAR MR. LYDON: I wish to thank your office for recently providing me a copy of the petition for certiorari in the above captioned matter.

I would, of course, express no comments regarding the record that has been before this Court and the Court of Appeals. I am writing this letter to you with copies to the petitioners, as I cannot, however, avoid comment upon the inclusion of the letter marked Appendix D and the references to it in the petition since that letter has never before appeared in any record of the proceeding before this or any other court and so that your office may necessarily be advised of its circumstances.

On the first day of the criminal trial, *US* v. *J. Ralph Gasque, et al.*, I received word that the United States Supreme Court had denied the petitioners' stay and I so informed the members of the press who were present. I also indicated at that time that the provisions of my May 31, 1976 order as modified and upheld by the Court of Appeals would remain in effect

and if the press would form a representative committee as suggested in my May 2, 1977 order, I would consider any appropriate inquiries concerning the former order. The press did so and specifically asked about the sketching provisions of the order. Upon their specific request, I lifted that particular portion of the order provided the sketching was done unobtrusively.

On the second or third day of trial the letter marked Appendix D was hand delivered by James Harrison, Jr., Esq. to my law clerk who brought it to my attention later in the day. I did not immediately act upon the letter since it was vague and not specifically directed at any particular provisions of the May 31, 1976 order and since I had made it clear to the press, some of whom were represented by Mr. Harrison in this suit, that I would be available to consider provisions of that order if they would make appropriate inquiries through a representative committee. I met with that committee several times throughout the trial and no further requests directed at the May 31, 1976 order were ever made by its members. No one ever mentioned the contents of the letter delivered by Mr. Harrison. Additionally, no other inquiries of any kind ensued from Mr. Harrison over the delivery or contents of his letter.

Although I can appreciate the interests of the petitioners in this suit and have informally accommodated their specific requests on other occasions, their formal intervention in this case precluded me from handling their unspecific requests informally as they were well advised. I did not consider the letter marked Appendix D standing alone to be an appropriate inquiry upon which to act and when no follow-up inquiry

of any kind ensued regarding its indefinite contents, the criminal trial progressed and ended without its further consideration.

Very truly yours,

J. ROBT. MARTIN, Jr.,
United States District Judge.

cc:
James C. Harrison, Jr., Esq.

U.S. GOVERNMENT PRINTING OFFICE: 1977